THE INDIAN JOURNAL OF PUBLIC ADMINISTRATION

(The views expressed in articles are the personal opinions of the contributors and are in no sense official, nor is the Indian Institute of Public Administration nor the Editor responsible for them)

Articles, comments, correspondence and reviews may kindly be sent *in duplicate* to the Assistant Editor, the Indian Journal of Public Administration, and enquiries and subscriptions may be addressed to the Registrar, The Indian Institute of Public Administration, Indraprastha Estate, Ring Road (East), New Delhi-110002

THE INDIAN INSTITUTE OF PUBLIC ADMINISTRATION

The Indian Institute of Public Administration was established in March 1954 under the presidentship of Late Shri Jawahar Lal Nehru, Prime Minister of India The Institute has been recognised as the National Section for India of the International Institute of Administrative Sciences Regional Branches of the Institute have been established in Andhra Pradesh, Goa, Gujarat, Karnataka, Kerala, Madhya Pradesh, Maharashtra, Orissa, Punjab, Haryana & Chandigarh, Rajasthan, Tamil Nadu, Uttar Pradesh, and West Bengal; and Local Branches at Ajmer, Baroda, Beawar, Belgaum, Calicut, Dharwar, Imphal, Jammu-Srinagar, Kolhapur, Kota, Mysore, Nagpur, Patiala, Patna, Pondicherry, Pune, Ranchi, Sangli, Santhal Pargana, Shillong, Sirohi, Sholapur, Udaipur, Ujjain, Vallabh Vidyanagar and Warangal

The Institute's ordinary membership is open to all persons above 21, who are actively interested in or concerned with the study or practice of public administration, the annual subscription being Rs 30 Associate membership, without the right to participate in the management of the Institute's affairs and with a membership fee of Rs 15 per annum, is open to bona fide post-graduate students and persons below 21 but otherwise eligible Corporate members are admitted on such conditions as may be specified in each case Subscription for Life Membership is Rs 300

The services offered by the Institute to its members include free supply of the Institute's Journal and selected research publications, a reference and lending library, information and advise on administrative problems, and participation in the Institute's activities

THE INDIAN JOURNAL OF PUBLIC ADMINISTRATION

VOL. XXV OCTOBER-DECEMBER 1979 NO. 4

Subscription { Inland—Annual : Rs. 25.00. Single Copy : Rs. 7.00
Special No. (for Non-Subscribers): Rs. 20.00
Abroad—Annual : £ 4.00 $ 9.50 Single Copy : £ 1.25 or $ 3.00

CONTENTS

OUR CONTRIBUTORS

Articles

DR. C P. BHAMBHRI—Professor, Centre for Political Studies, Jawaharlal Nehru University, New Delhi.

DR. GORDON DOHLE—Department of Political Science, Carleton University, Ottawa, Canada.

PROF. GAVIN DREWRY—Lecturer in Government, Bedford College, University of London, London.

DR. B J.S HOETJES—Department of Political Science, University of Leydan, the Netherlands.

DR A. HOYLE—School of Administrative Studies, Canberra College of Advanced Education, Belconnen A C T., Australia.

DR. R.B. JAIN—Professor and Head, Department of Public Administration, Panjabi University, Patiala

SHRI P.M KAMATH—Montague Lecturer in Politics, Department of Civics and Politics, University of Bombay, Bombay

DR. P.K KURUVILLA—Associate Professor, Department of Political Science, Wilfrid Laurier University, Waterloo, Ontario, Canada.

PROF. SHRIRAM MAHESHWARI—Professor of Political Science and Public Administration, Indian Institute of Public Administration, New Delhi.

SHRI S C MISRA—IPS, Retd, Formerly Director, National Police Academy, Mount Abu. (now in Hyderabad)

DR O.P. MOTIWAL—Divisional Manager (Law). Minerals & Metals Trading Corporation of India, New Delhi.

SHRI M. CHALAPATHI RAU—Former Editor, National Herald, New Delhi

PROF. DONALD C. ROWAT—Department of Political Science, Carleton University, Ottawa, Canada.

PROF. K. SESHADRI—Chairman, Centre for Political Studies, Jawaharlal Nehru University, New Delhi.

SHRI G.B. SHARMA—Department of Political Science, Carleton University, Ottawa, Canada.

DR. P.D. SHARMA—Professor and Head, Department of Public Administration, University of Rajasthan, Jaipur.

DR. O. GLENN STAHL—Former Adjunct Professor of Public Administration, American University, Washington, DC, USA and former Ford Foundation Consultant to India.

Review Articles

DR. N.K.N. IYENGAR—Reader in Personnel Management, Indian Institute of Public Administration, New Delhi.

SHRI S.C. VAJPEYI—Resident Director, Indian Investment Centre, London.

Bibliography

SHRI R.N. SHARMA—Deputy Librarian, Indian Institute of Public Administration, New Delhi.

SHRI MOHINDER SINGH—Librarian, Indian Institute of Public Administration, New Delhi.

EDITORIAL

THE OPERATIONS and practices of the government do require a certain degree of secrecy. Negotiations with foreign governments are not always possible in the full gaze of publicity. Similarly it is not unusual that during war and external aggression governments may be interested in keeping certain matters hidden from its own citizens at least for some time so that the enemy does not get any fortuitous advantage. Besides, the morale of the people in general and of the forces is not to be jeopardised. Secrecy becomes an important factor in personal matters also, for example, regarding health records, financial status or banking operations of individuals. Even universities cannot dispense with secrecy altogether in the conduct of examinations and tests Research organisations and research consultants have to have certain modicum of secrecy keeping in view their purpose Even business and industrial organisations who often press for more openness in governmental policies and procedures, may themselves operate behind a veil of secrecy and it is not unusual when the government has to step in making it obligatory for them to disclose certain kinds of information The non-disclosure of information of many kinds by the transnationals to both the host and the home countries have become a matter of controversy in many international forums The press itself claims the privilege not to disclose its sources of information This is considered to be a sacred trust and responsibility in the world of journalism. In view of the many scoops of 'investigative journalism' in many countries in the recent past, this has also become a matter of debate from the angle of individual right and public good.

It is the problem of secrecy in government that has caused widespread interest and concern all over the globe. It is so because of the direct interface of the government and the citizen especially in the context of the pervasiveness of the government in the life of the citizen because of the activist social and economic policies resulting from the temper of the times It is the government which mobilises resources and allocates them for various purposes. Naturally the people are not only interested in the maximisation of resources and their optimum utilisation but also are desirous of knowing about the nature and

category of the beneficiaries. Besides, the classic arguments of freedom versus arbitrariness are there. From a positive viewpoint, it is a question of communication within the government and in relation to the public if the government has to win the trust and support of the people. Expressing the inadequacy of 'representative' government, William A. Robson says: "We now realize that this is insufficient in a democracy to ensure mutual understanding between the governors and governed; and that without such understanding a high degree of popular participation is difficult to achieve. A widespread knowledge of the aims and purposes of government is necessary to secure consciousness of consent and popular support. Moreover, knowledge by the people of what the government wants them to do is essential for the success of much public administration". This provides the democratic rationale for greater openness in government.

Contributors to this volume discuss the question of administrative secrecy under several assumptions. They exclude the implications of secrecy under an authoritarian or totalitarian system as is commonly understood The question of secrecy versus the public's right to know is more germane to democracy; and democracy, as observed by someone, is not only by discussion but also based on a healthy distrust of authority. Another assumption is that the three main wings of the state, *viz.*, the legislature, the executive and the judiciary, maintain or establish an equilibrium in safeguarding public interest and, simultaneously, in ensuring that the right of the public to know is honoured in an environment, often of conflicting interests and viewpoints. Many writers refer to the power of the executive and the growing influence of the bureaucracy as one of the main reasons that inhibit a greater access to information. They plead for a greater role and administrative reinforcement of the legislature and the judiciary to cope with and contain this situation.

This entire question has to be viewed in a wide perspective in the differing conditions and constitutional and political systems in the different countries The country-specificity is an important factor in making any judgement though the ideological shades may not altogether be ruled out. It is no doubt true that the policy-making and policy execution have both become so complicated a matter that all possible information must be available to the judiciary as well as to the people's representatives in the legislature if judicial control and democratic accountability of administration are to be effectively ensured.

Within these wide parameters the writers have taken up official secrecy and advanced their reasons for the enlargement of the area of openness and at the same time laid stress on the public's vigil to preserve what is their legitimate right to know more about how

they, the people, are governed. In the light of their views and analysis they have explored the problem in its theoretical dimensions and also with reference to specific countries and governments.

Several writers stress the dysfunctional aspects of secrecy also. The administrative policies, processes and procedures should bear an occasional scrutiny and publicity so that capricious actions as well as any odium of favouritism, discrimination and arbitrariness are avoided. George E. Berkley refers to the danger of accountability withering away and objectivity shrinking in an environment of secrecy. He goes on to say: "Those who are 'in the know' tend to develop an arrogance and contempt for those who are not . Secrecy obviously reduces communication and leaves decision-makers, even when they possess the best will in the world, with diminished capacity to make the best decisions". Again he draws attention to certain other aspects: "In limiting decision-making to a relatively few insiders, secrecy tends to limit discussion and debate. Frequently, the decision is made by those who are too personally involved and have too much at stake....Finally, trying to keep a matter hidden may only result in becoming better known Secrecy sows suspicion; the more secret an agency is, the more it arouses fear and distrust" Occasionally, any attempt at secrecy only engenders misinformed and illinformed publicity or calculated leaks creating a miasma of suspicion

The ramifications of the public's interest in knowing more about administration is not without pitfalls, for, it is seldom the 'public' but several 'publics' that a government deals with The role of the pressure groups is relevant in this context Again, the question is, how far are the people keen to know more about administration, for, even where a society is open, the avenues kept open are not always made use of by the public in whose name openness is sought. In fact, it is pointed out that even in the US where the freedom of access to information is quite liberal, there is a feeling that few bother to make use of the facilities, and the rest are unconcerned.

It can be conceded that openness is preferable to closeness Several governments have however come to recognise the limits of openness in so far as anything beyond may encroach upon individual privacy. A distinction is made between 'secrecy' and 'privacy' and it is held that the right to privacy is an inviolable right of an individual Information that a government gathers about an individual, particularly with computerisation, is growing and the risk of misuse, if not blackmail, is real. The US, for example, has passed a Privacy Act almost simultaneously with its Freedom of Information Act, the former to protect the individual from misuse of personal data with the government agencies.

The model for several of the countries is obviously Sweden where freedom of information has not only the longest tradition but is recognised as a constitutional right. Outside Europe, the US has gone the Swedish way but apparently not without a prolonged public struggle for recognition of the right to freedom of information and in the face of recorded hesitation on the part of the Presidents of the time

Britain, on the other hand, has stuck to its 1911 Act although, over the years, public opinion has been veering round to the view that Section 2 of the 1911 Act is an anachronism. Several committees—the Fulton Committee and the Franks Committee, to mention two—have underlined the need for reform and the government itself had brought out a White Paper and a Green Paper to lend support to more openness. The Thatcher Government recently introduced a Bill in the House of Commons conceding the scope for enlargement of openness but, in view, apparently, of the spy scandal which exploded in that country recently, the new Bill has since been withdrawn.

Canada and Australia which had so far kept the British tradition and practice, recently moved forward with measures, pending before their legislature, to extend freedom of information to areas which hitherto had remained inaccessible to the public. The articles in the volume exemplify this aspect of the new direction that these countries have taken.

As regards India, the Official Secrets Act is modelled on the British statute and its clause 5 is a 'catch-all' provision, according to many commentators and jurists Recently a working group went into the problem and reviewed the situation but it was felt that the present circumstances did not warrant any major change.

The Official Secrets Acts of both Britain and India are not directly concerned with openness in government. They primarily deal with information that needs to be protected from unauthorised disclosure. A reasonable way, in general, to prevent leakage of sensitive information is obviously by a proper classification of documents and by strictly enforcing the rule of 'need to know' among top civil servants while distributing copies of classified information, with the added provision of a regular procedure of declassification of documents, periodically, when they cease to be sensitive any more. Another safeguard can be to devise a system which really works regarding the correctness of the classification of information by entrusting this responsibility to a group of ministers who can exercise the necessary political judgement.

In the parliamentary form of government there is the added problem of ministerial responsibility to parliament and the ministers collectively being accountable to the people through parliament This

is quite often cited as a reason for official unwillingness to disclose information but, according to some, a direct correlation between ministerial responsibility and official secrecy may not be able to be established. In any case, the general consensus in Britain seems to be to liberalise the range of official information, the disclosure of which should no longer be a criminal offence.

The freedom of the press vis-a-vis official information is another area where there is considerable scope for a fresh look. Those who ask for free access to information argue that they are not trying to assert any special privilege, but only want to protect, what they consider to be, the press's own social function of informing the public. They further say that to the extent that access to information is denied to the press, there is the likelihood of a credibility gap between the government and the press and consequently the public. On the contrary, if information is denied, the media will come to rely on 'leaks', and such 'leaks' may happen to be inspired or prejudiced; both ways, it affects credibility. Denial of official information, especially to the press, often, leads to court cases in many countries and judicial interpretations have a vital bearing on openness.

It is not necessary here to refer to the valuable contributions in detail or to try to sum up their arguments. We may not agree in its entirety either with the analysis or even with the conclusions, but our purpose is not to arrive at any consensus, but only to stimulate thinking and debate on this topic. In an area where so much of thinking is going on, where laws and practices differ from country to country, no general formulations are possible as to the limits and the nature of secrecy in administration.

We will only conclude by drawing attention once again to Robson: "Knowledge by the people about their government is indispensable if democracy is to succeed. The government cannot operate successfully if its activities are veiled in ignorance, misunderstanding and mystery. Public authorities must come into the market place and tell people simply and clearly what they are trying to do and why. They should explain and justify their methods. They should be frank about difficulties and shortcomings Only by a deliberate effort of this kind can prejudice and ignorant or malevolent criticism be avoided, and a discriminating body of public opinion built up.

"Without such a body of informed opinion the government is unlikely to be judged fairly It will not be praised for its successes or blamed for its failures. And if the public cannot judge the quality of its government with some discrimination, that quality is unlikely to be high. Instead of sound schemes of constructive public administration we are likely to have demagogery, bread and circuses as in Argentina under Peron, or sabre-rattling as in Italy under Fascism.

Hence, part of the task of government is to enlighten the people about its purposes and programmes."

We are grateful to the distinguished writers and experts, especially those from abroad, who very kindly responded to our request for their learned contributions. We do hope this volume will add richly to the ongoing debate in this vital area of political process and public administration. Towards this, we have added a number of documents, in fact, a dozen of them, as supplementary reading material to the articles. Most of them are legislations already passed or are Bills under consideration in the legislature of the respective countries.

Shri Mohinder Singh and Shri R.N. Sharma of IIPA have compiled the bibliography and we acknowledge here their help as also that of Shri Avinash C. Maheshwary, South Asia Librarian, Duke University, North Carolina, who gave us a very useful supplementary list of books and articles available in that university library on the topic.

We wish the members of IIPA, subscribers and readers a very Happy New Year.

—EDITOR

Laws on Access to Official Documents

Donald C. Rowat

THE MOST advanced democracies have been gradually coming to realise that they have inherited from earlier times a tradition of governmental secrecy which is incompatible with the people's right to know how they are being governed. The principle embodied in this tradition is that all administrative information is to remain secret except that which the government decides to release. This principle of 'discretionary secrecy' means that the government of the day has the discretion to keep secret whatever documents and information it wishes, and is free to do so to protect its own partisan interests. It also means that the public have no right to see or use the vast store of documents and data which have been paid for with their taxes, and that they do not have complete information upon which to base their judgments on public issues or their control over the government.

By now, several democratic countries have reached the conclusion that this principle is wrong and ought to be the reverse: all administrative information is to be open to the public except that which needs to be kept secret as defined by law. These countries have therefore adopted laws which establish the principle of governmental openness, and which provide a public right of access to all administrative documents and information except for specific matters that are narrowly defined. Such laws, of course, involve a radical shift in the balance between governmental secrecy and openness. Hence, governments contemplating a move toward greater openness have much to learn from a study of experience with these laws, and of proposals for similar laws in other countries.

The country having the longest experience with the principle of openness is Sweden. Its law on public access dates back to 1766 Other countries have adopted a similar law, but in much more recent times Those having adopted one long enough ago to have had some experience with its actual working are: Finland (1951), Denmark (1970) Norway (1970) and the United States (1966). Countries in which laws on public access have been adopted recently or will soon be approved are: Austria, France, the Netherlands, Canada and Australia. This article will discuss the nature and impact of the older laws in Scandinavia and the U S, the recent

developments elsewhere, and the lessons that may be learned from such a comparative review.[1]

THE OLDER LAWS IN SCANDINAVIA AND THE U.S.

Sweden

For over two hundred years the Swedish constitution has provided for open access to official documents and full information to any citizen about administrative activities. This provision was first adopted in 1766, as part of the Freedom of the Press Act, one of the country's four basic constitutional laws. It arose out of the intense struggle in the last half of the 18th century between the two main political parties, the Hats and the Caps. When the Hats were defeated in 1765 after a long term of office, the Caps inserted the principle of public access in the Freedom of the Press Act because of their frustration over administrative secrecy as well as press censorship under the previous regime. After a period of absolutism between 1772 and 1809, parliamentary government and the Freedom of the Press Act were re-established, and the principle was soon fully accepted as part of the normal political life of Sweden While in most countries all administrative documents are secret unless specific permission is given for their release, in Sweden they are all public unless legal provision has been made for them to be withheld

The Swedish constitution recognises that there are certain types of documents that ought to be kept secret, and lists them as exemptions from the general rule. The actual wording is as follows:

> To further free interchange of opinions and enlightenment of the public every Swedish national shall have free access to official documents. The right to have access to official documents may be restricted only if restrictions are necessary considering: (1) the security of the Realm or its relations to a foreign state or to an international organization. (2) the central financial policy, the monetary policy, or the foreign exchange policy of the Realm; (3) the activities of a public authority for the purpose of inspection, control, or other supervision. (4) the interest of prevention or prosecution of crime; (5) the economic interests of the State or the communities; (6) the protection of the personal integrity or the economic conditions of individuals; or (7) the interest of preserving animal or plant species.[2]

[1]The material in this article is based on my comparative report in *Administrative Secrecy in Developed Countries* (London Macmillan; and New York: Columbia University Press, 1979), on my research report for the Ontario Commission on Freedom of Information and Individual Privacy, *Public Access to Government Documents: A Comparative Perspective* (Toronto, 1978), and on visits to all of the countries concerned.

[2]*Constitutional Documents of Sweden* (Stockholm: the Riksdag, 1978), 18

It will be noted that all of the general circumstances traditionally used as arguments against free access to administrative information are covered by this list of exemptions It should also be noted that in general the right of free access is to prevail and that this right shall be subject, as the constitution says, 'only' to the exceptions listed The constitution goes on to say that the specific cases in which official documents are kept secret shall be 'closely defined' in a special statute. As one might expect in a modern welfare state, this law, called the Secrecy Act, spells out an impressive list of matters that must be kept secret. But, as an eminent Swedish scholar, Prof. Nils Herlitz, has pointed out:

> The detailed catalogue of the Secrecy Act has also a considerable effect *e contrario*. Since we have modern legislation providing for secrecy when *it is necessary it follows that where publicity is required, it must be* properly and conscientiously adhered to And publicity has nowadays a very strong support in public opinion, as a keystone of our constitutional system It is a considerable and effective force felt in every section of social life [3]

A full appreciation of the impact of the Swedish principle of open access can be gained only by giving some examples of the extensiveness of its operation. It applies, for example, to public documents kept by all sorts of administrative agencies, from government departments to police officers, administrative tribunals and local governments Moreover, anybody is entitled to ask for documents, he does not have to show that he has a legal interest in seeing them nor is he obliged to say for what purpose he wants them. To make sure that agencies do not purposely delay in answering a request, the constitution provides that a requested document shall be "made available immediately or as soon as possible", and the courts in their judgements have taken this rule seriously.

The definition of 'official documents' includes not only those prepared but also those received by a public authority. And their availability to the newspapers has been organised as a routine service:

> Every day, in the great offices in Stockholm, for instance, documents which have been received will be brought to a room where representatives of the newspapers are welcome to see them A representative of the leading news bureau will never fail to appear, and through him a flood of news will go to the newspapers and to the general public The purpose is this. Just as publicity in the courts all over the world makes it possible for everybody to know how justice is administered, the publicity of documents has the same effect insofar as documents reflect the activity

[3] N Herlitz, "Publicity of Official Documents in Sweden", *Public Law* (Spring, 1958), 53

of the authorities; the publicity shall provide (as the Constitution says) 'general enlightenment'.[4]

When I visited Sweden in 1973 to study its unique system of openness, I was lucky enough to accompany a reporter who worked for the Swedish national press agency, as he made his daily rounds of three government departments. To my amazement, all incoming and outgoing documents and mail were laid out in a special press room in each department for an hour every morning for reporters to examine. If my reporter wanted further information on a case, he simply walked down the hall to look at the department's files. No special permission was needed. Such a system of open access is so alien to the tradition of secrecy elsewhere as to be almost unbelievable. Prof. Herlitz has noted that when he would give a speech about it in other countries, he was often amused by the reaction of his audience. It was clear that they pondered questions such as these: "Is this man unable to express himself intelligently in my language? Or is he mad?"[5]

The Swedish tradition of openness is so firmly embedded that the Secrecy Act, government regulations, the courts and the ombudsmen all place great weight on the need for free public access to administrative documents. For instance, in the Secrecy Act itself and in government regulations, the secrecy of documents is valid for only a specified period of time, and the restrictions are not valid for documents preserved in the courts. The Secrecy Act, far from stating that the documents of the Foreign Office or of the armed services are to be kept secret altogether, carefully enumerates those which may be kept secret temporarily. And in many cases the ombudsman for military affairs has insisted upon publicity of information unjustifiably withheld by the military establishment. It is also noteworthy that most of the secrecy exemptions do not refer to documents containing administrative decisions on individual cases. Here the rights of persons having an interest in seeing the documents have been upheld by the courts in a great number of cases. The principle of free access to documents is also upheld in a positive way by regulations which require special arrangements to facilitate easy access by the press, scholars, interested parties and the public generally. Most agencies, for example, keep up-to-date diaries in which information about documents received is easily available.

At the same time, an important limitation on access to administrative documents has been created by the distinction between official documents and internal working papers. An understanding of this distinction is vital because of the false arguments used in other countries by some opponents of access. They claim that public access would seriously interfere with the day-to-day work of administration, and would inhibit public servants from

[4]N. Herlitz, *op. cit.*, 54-5.
[5]*Ibid*, 50.

giving frank advice to their superiors for fear it would be made public It is important to realise that there is no right of access to internal notes, drafts and tentative working papers. The right applies only to completed documents or documents sent from one authority to another. Thus, normally the right of access exposes to public view only an official's fully considered advice in the form of a finished document. This is not likely to inhibit his frank opinions, which can still be given to his superior confidentially if necessary Indeed, knowing that his written advice on an important matter may be made public, he is likely to think it out more carefully and to present a view that is not only more clearly argued and more fully supported but also more objective. In short, his advice will be better.

Since the distinction between an official document and a working paper cannot always be drawn easily, no doubt officials in Sweden sometimes take advantage of this fact to keep information confidential in the form of an exempt working paper which, if defined as an official document, would be publicly available Much administrative information at the policy-making level within ministries is thus kept confidential, although many policy documents are released which in other countries would be considered internal documents. For instance, although ordinarily ministry documents on a policy matter are not publicly released until a decision has been made by the cabinet, at that time all of the supporting documents, including those containing the views of senior officials, are released with the decision.

Sweden's long experience with the principle of openness indicates that it changes the whole spirit in which public business is conducted. It causes a decline in public suspicion and distrust of officials, and this in turn gives them a greater feeling of confidence. More important, it provides a much more solid foundation for public debate, and gives citizens in a democracy a much firmer control over their government.

One of the favourite claims advanced by those who oppose open access is that Swedish officials evade the access law on a large scale by passing information to one another orally instead of committing it to paper This claim, of course, is impossible to document, but unfortunately it is similarly difficult to disprove My own view is that it is mainly a myth dreamed up by opponents of administrative openness which is based on false fears and on two serious misconceptions The first misconception is a lack of understanding that in Sweden there is no right of access to working papers. This means that it is quite possible to transfer confidential information in written form within a department or the ministries. The second misconception is the assumption that Swedish officials want to withhold non-secret information My interviews with Swedish officials have led me to believe that, on the contrary, they are so imbued with the tradition of openness that they automatically expect as much information as possible to be released It is true that a few matters of a delicate nature, such as personal recommendations, are

dealt with orally or by telephone rather than committed to paper, as they would be in any country But my Swedish informants felt that in this respect the administrative practices in Sweden were not much different from those in other countries In fact, one of my informants, a departmental administrator, insisted that the tradition of documenting everything was so strong in Sweden that officials do not transfer information orally by telephone or interview as much as they should, or even as much as officials do in other countries

Those who argue that the attitude of openness with which Swedish officials are imbued cannot be created quickly are probably right. A long-standing tradition of secrecy cannot be reversed overnight simply by passing an access law The law must be accompanied by a thorough programme of administrative training in the new practices it requires. Such programmes were conducted in Denmark and Norway when their new access laws were adopted, and this goes far towards explaining the successful implementation of these laws. At the same time, because of the natural tendency for officials to withhold information for their own convenience, the public and the press must be constantly vigilant to enforce their rights of access. This vigilance must be supported by a thorough knowledge of their rights. Hence the provisions of the law and the key decisions interpreting these provisions must be widely known among not only officials but also news reporters and the general public. To meet this need in Sweden, Mr. B. Wennergren, a former ombudsman, produced a short book on the provisions and key interpretations of the laws on public access. In an excellent comparative article, his conclusion regarding the Swedish experience is that the right of access is very seldom abused, and that it does not impede the daily work of administration "to any degree worth mentioning".[6]

The Other Scandinavian Countries

Because Finland was part of Sweden in the 19th century, it has inherited much of Sweden's tradition of openness, but in a considerably weaker form and without a constitutional right of public access. In fact, it was not until 1951 that Finland's practices and regulations on the subject were consolidated into a law, the *Law on the Public Character of Official Documents* Denmark and Norway have also adopted laws on public access to official documents but only in very recent times Oddly, both countries passed laws on the subject in the same year, 1970, though Denmark had already adopted a law in 1964 providing for a citizen's right of access to documents in his own case. The Act of 1964 became part of its more general law of 1970.

A comparison of the legal provisions in these three Scandinavian countries

[6]See B. Wennergren, "Civic Information—Administrative Publicity", *International Review of Administrative Sciences*, XXXVI, 24 (1970), 249.

with those in Sweden reveals some significant differences.[7] The main one is that their provisions for public access are weaker and less far-reaching than Sweden's, while their provisions for secrecy are more general and hence broader. In Sweden the law that establishes the general right of access, the Freedom of the Press Act, is part of the constitution, which means that it can be amended only if the amendment is repassed after an intervening election. The Secrecy Act, on the other hand, is only an ordinary law. Except notably for the categories of foreign affairs and national defence, it lists these exceptions in narrow and limiting detail. In Finland, though the public access law of 1951 is an ordinary law, the more detailed secrecy provisions are in the form of a decree, which has a lower legal status. These provisions are much briefer and more general than in Sweden, and hence leave more discretion to officials and less specific grounds for appeal. The Public Access Acts in Denmark and Norway are also ordinary laws, which include general exemptions from access. These exemptions, too, are much broader than those in Sweden's Secrecy Act.

The Danish and Norwegian Acts do not provide as full a right of access as do the laws for the other two countries. In Denmark and Norway reporters or citizens must identify and request specific documents. This means that they must know that a document exists before they can ask for it. In Denmark, since they do not have access to departmental registers, they may not even know that a document exists. These are serious limitations on public access. They help to explain why the Danish national press bureau does not consider it worthwhile to send reporters on daily visits to the ministries An official in the Danish Ministry of Justice informed me that, since the adoption of the Danish and Norwegian Acts in 1970, his ministry had received only a handful of requests for documents from the press and the public, while in Norway every morning a reporter would call at the Ministry of Justice and ask to see several documents. However, the Danish Act is to be reviewed by a parliamentary committee, and an amendment may grant access to departmental registers.

Though the laws in Denmark and Norway are more restrictive than those in Sweden or even Finland, when these laws were adopted a serious attempt was made to implement them liberally. For example, officials in the Danish and Norwegian Ministries of Justice conducted training sessions for public servants in other ministries and agencies, and gave them guidelines on the changes in practice needed to give a liberal interpretation of the new law. Both ministries have placed advertisements in all daily newspapers to inform citizens of their right of access to official documents A Norwegian advertisement in 1975 featured a cartoon of four citizens poking into a

[7]The following comparative survey is based on my general comparative report in the book which I edited for the International Institute of Administrative Sciences, *Administrative Secrecy in Developed Countries, op cit.*

bureaucrat's files, and gave a simplified explanation of the Act. It pointed out that a citizen does not have to give a reason for wanting to see a particular document; "pure curiosity is a satisfactory ground," it said, and added that if his request is refused he can appeal to the ombudsman or a court.

One of the most significant differences between Sweden and the other Scandinavian countries is found in the types of authorities that hold the administrative documents. In Sweden governmental departments are separated from the ministries under boards, and have much the same degree of independence as public corporations or regulatory bodies in other countries. As a result, when a department wishes to communicate formally with any ministry, it must produce a document which is then sent through the mail to the ministry, and this makes it publicly accessible. Thus even policy advice at a high level from a department to its relevant minister becomes public knowledge, whereas in other countries such advice is normally passed from a department to its minister as an internal document. This fact is of great importance in contributing to the openness of the Swedish administrative system. On the other hand, as in other countries, since the ministers as a collegial executive are considered to be a single unit, documents passing from one ministry to another before decisions are taken are regarded as internal working documents and therefore not accessible.

Because the effectiveness of an access law depends heavily on the organisation, traditions and practices of the press, we should also note the differences in this respect among the four countries. In Sweden, the national press bureau sends reporters on daily rounds of the ministries and most important departments and agencies. It has about fifteen reporters who cover about seventy ministries and departments. As a result, the bureau sends out annually about 5,000 government stories on the national wire and about 40,000 to local newspapers. Reporters in Norway and Finland (but not Denmark) also do daily rounds of ministries but there the coverage is not so thorough In Finland, for instance, during my visit in 1973 reporters from the national press bureau were making daily rounds to only three ministries: Interior, Transport, and Social and Health. Finnish reporters do not call daily at the ombudsman's office, and rely mainly on his press releases and annual report for news stories on cases Some of my informants stated that the main reason the press bureau had not extended the system to other ministries was the cost of extra staff and of photocopying documents, while others argued that it was simply a matter of tradition and inertia on the part of the press bureau Another factor, however, may be the reluctance of the government to provide facilities for the press in each ministry.

Since the media are interested in current news, they of course rely heavily on oral information obtained quickly from officials by personal interview or telephone. The easy accessibility of oral information is therefore of prime importance to the press. Even before the new access Acts were passed in

Denmark and Norway, press relations with officials were very good. Partly for this reason, reporters and news organisations have not had to appeal many cases under the new laws. A more important reason, however, may be that the very existence of the access laws has given reporters a lever with which to press for information. The ability to threaten to ask for documents in a case no doubt forces officials to be freer in offering information orally and to be surer that their information is accurate.

Two outstanding examples may be given of information revealed through the press soon after the Danish Act went into effect. In the first case, the press demanded and got documents containing proposals made to the government by the SAS airline, a Scandinavian government corporation. Formerly, these documents would have been secret. The other was a case in which a newspaper published accusations against local public welfare homes. The government asked the homes for reports in response to these accusations, and the newspaper successfully requested and published these reports. Since the reports showed many of the accusations to be false, their publication helped to clear the air, and may be regarded as a desirable public service.

In Sweden and Finland an important buttress to press access is the legal requirement regarding the non-revelation of news sources. News reporters cannot be compelled by the courts to reveal the name of a person who gave them information, even if this person was a public employee. In Sweden, if there is a 'leak' of information, a senior official is not even allowed to ask a reporter from whom he got his information, and the official may not conduct a search for the name of the offending junior official, unless the information was clearly in the secret category under the law. This constitutes a powerful protection against governmental withholding of information. It is in marked contrast to the ambivalence of court decisions on this subject in the common-law countries, though several American states have similar 'shield' laws for reporters.

In all the four countries, as in other countries, the originator of a document may indicate its security classification by placing a secrecy stamp on it, but the difference from most other countries is that neither [illegible] may make the final decision as to its secrecy. It must [illegible] matters which are listed as secret according to law, and [illegible] private citizen disputes the classification, he may appeal [illegible] authority for a decision on whether the document [illegible]

It is important to note that in the Scandinavian [illegible] than one independent authority to which an appeal [illegible] and Sweden the appeal can be taken to the [illegible] Justice or the Supreme Administrative Court [illegible] it can be taken to the ombudsman or the [illegible] between the types of appeals that go to a [illegible] the Chancellor of [illegible] instance, a report[illegible]

ombudsman, while a newspaper or business firm would usually take a case to the court The reason is that an appeal to the courts is more costly and time-consuming, but results in a binding decision. An ombudsman's decision is only advisory, though it is almost always accepted by the government. There are more appeals in Sweden than in the other Scandinavian countries and most of them are made in the form of complaints to the four parliamentary ombudsmen.

Two examples of appeals made in Sweden will give some idea of how its appeal system works to limit secrecy. These were among several kindly chosen and translated for me by the Swedish ombudsman. One is from the ombudsman's annual reports, and the other from the records of the Supreme Administrative Court. In the first case, an officer reported to the military ombudsman that a practice had developed in the armed forces for officers to communicate by letters marked personal He wanted to know if such letters could correctly be regarded as personal documents The ombudsman replied that what made a document official and public was its contents irrespective of whether it was marked personal A letter about an official matter should therefore be regarded as an official document and, if no secrecy clause was applicable, as a public one. The armed forces then changed their practice to conform with the ombudsman's conclusion

The second case concerned a Swedish colonel unmasked as a spy who had delivered crucial military secrets to the Soviet Union. A special commission appointed to investigate had requested the Prime Minister, the Minister of Defence and the Minister of Justice to submit written reports about the matter. When the reports arrived, a journalist asked to see them, alleging that they were official and public documents The commission refused, and in justification referred to Article 10 of the Secrecy Act, which provides for the secrecy of investigations by the police and prosecutors. The journalist then appealed to the Supreme Administrative Court, which concluded that the commission could not be regarded as a police or prosecuting authority and therefore ordered the documents to be released

The United States

The United States has enjoyed a stronger tradition of governmental openness than that of most other countries Nevertheless, until very recent years, the release of administrative documents was largely at the discretion of the chief executive, whether federal or state, or the heads of his departments and agencies. At the federal level, it was not until 1946 that provisions were included in a congressional law, the Administrative Procedure Act, which attempted to require the routine disclosure of government-held information It stated as a general principle that there should be free public access to administrative documents except for certain broad exemptions. However, the attempt failed, partly because of the vague language of the exemptions. Thus the Act exempted from disclosure records involving "any

function of the United States requiring secrecy in the public interest" as well as "information held confidential for a good cause found" Moreover, only "persons properly and directly concerned" were entitled to procure certain public records, and there was no provision for judicial remedy The attempt also failed because the Act was soon followed by the period of the Cold War in the 1950s, in which the desire to protect national security caused almost a mania among government officials for keeping information secret. The result was an unnecessary over-classification of millions of government documents.

An important change came with the passage of the Freedom of Information Act in 1966, however This Act, replacing the provisions of 1946, stated unequivocally that public access to most documents was to be the general rule. More significantly, it listed what types of documents could be kept secret, in nine general categories of exemption, and provided for a means of public appeal against withholding These provisions finally established the Swedish principle of openness. disclosure is the general rule, and documents may not be withheld unless they fall under one of the exemptions specified by law The categories of exemption, however, are much broader than those of Sweden and hence leave more room for official discretion and judicial interpretation Difficulties arose in requiring departments and agencies to comply with the Act and in interpreting the meaning of some of the exemptions For this reason it was amended in 1974 In that year Congress also passed a related Privacy Act, which allows citizens to see personal files being held on them in government agencies, subject to certain exemptions

The new provisions put into the Freedom of Information Act in 1974 have made it much easier for citizens to enforce their rights. The onus has been put firmly on government agencies to prove why they should not release requested documents, instead of the citizen having to prove why he should have them. Also, administrative officials are now instructed to reply to a request for a document within ten working days, and to an appeal to a higher authority in the department within a further twenty working days, though for special reasons they can get an extension to a total of forty days They are also required to release all non-secret information that is segregable, even in a secret file. This has necessitated what officials refer to as a 'paragraph-by-paragraph' review of documents, and may result in a requester obtaining a document with certain names or material blanked out

Moreover, the language of some of the exemptions has been tightened up, so that officials can no longer hide matters as easily under them The actual wording of the nine exemptions as amended in 1974 (with the amendments shown by underlining) is as follows: the right of access does not apply to matters that are:

1. (A) specifically authorised under criteria established by an Executive Order to be kept secret in the interest of national defence or foreign

policy, *and (B) are in fact properly classified pursuant to such Executive Order;*

2. related solely to the internal personnel rules and practices of an agency,
3. specifically exempted from disclosure by statute (amended in 1976 to add: *.provided that such statute (A) requires that the information be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of information to be withheld*);
4. trade secrets and commercial or financial information obtained from a person or privileged or confidential;
5. inter-agency 'or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
6. personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
7. investigatory records compiled for law enforcement purposes, *but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;*
8. contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
9. geological and geophysical information and data, including maps, concerning wells.

It will be noted that the most important areas of exemption are the same as those in the Scandinavian laws.

Under the addition to the first exemption, a judge can now examine even classified documents to see if they were properly classified or whether excised parts were legitimately blanked out to protect national security or individuals A department's fear that a decision to withhold information will be overturned by the courts is a very sobering corrective to oversecretiveness. If a citizen appeals to the courts and wins his case, the judge can now order the government to pay all of the court costs.

Under the amended Act a citizen is no longer required to request a specific document. Since he may only suspect the existence of a document that ought

to be revealed and cannot request it specifically, it is now sufficient to 'reasonably describe' the documents he wants, and he can request all documents on a specified matter. Also, he can inspect these documents and only has to pay for the ones of which he wants photocopies, usually at the rate of ten cents per page, plus a search fee of $7 50 per hour if this is necessary. The fee is waived by some agencies, especially in the case of indigents or if the request is for information to be released in the public interest rather than for personal reasons. Thus the Central Intelligence Agency has waived most of its search fees, while the Federal Bureau of Investigation has not

The revised Act also provides for disciplinary action against officials who wrongfully refused to release documents, permits officials to release exempted ones, and requires the departments and agencies to submit annual reports to Congress These reports give such information as the cost of handling requests for documents, the names of the officials who have refused requests, the number they have refused, and the number of appeals against refusals

Under the more liberal guidelines of the 1974 amendments, requesters have flooded the federal courts with appeals, where they get priority over other cases From the cases already decided under the new guidelines, it is clear that the courts will be much less favourable to the administration than they were before 1974. Until now they have usually accepted a department's affidavit stating the reasons why a matter must be kept classified, but the courts may now start using their new power to look at a classified document to see if all or part of it can be ordered to be released There are also other problems of interpretation still to be solved, notably regarding the meaning of 'reasonably described' records and of 'internal agency memoranda'. A more precise meaning for many of the provisions, especially the new amendments, still remains to be spelled out by the courts.

The Privacy Act opened up another large category of government files when it came into effect in September 1975 Under it citizens now have the right to ask if a federal file is being held on them and to inspect it The Act is an omnibus measure regulating the acquisition, storage, retention and dissemination of personal files held by federal agencies It gives individuals an enforceable right to demand correction of files which are not accurate, relevant, timely and complete Also, agencies may only disclose files where authorised by statute, or with the permission of the individual affected And they must publish annually a description of their personal records systems, the categories of individuals and kinds of data covered by each system, the uses to which the information is put, and the agency policy regarding storage and disposal.

Many citizens make a request for their file under both Acts in the same letter There are advantages in doing this because, though the Privacy Act has fewer secrecy exemptions than the Freedom of Information Act, and allows private access to the file, the Central Intelligence Agency and law

enforcement agencies like the Federal Bureau of Investigation are completely exempt from the Privacy Act, and it does not include the instruction for a reply within ten working days.

In 1976, the first full year after both the 1974 amendments and the Privacy Act went into effect, the federal departments and agencies received a tremendously increased number of formal requests for access to official documents, the total estimated to be about 150,000. These requests were not only from private citizens, but also from the press, organisations and business firms Some agencies, like the FBI and the CIA, received thousands of requests from individuals wanting to know whether these agencies kept a file on them and, if so, what was in it. Before the end of the year, such agencies had a huge backlog of unprocessed requests, and by the summer of 1977 the FBI had to bring in 400 of its regular operatives from the field to handle them

Many startling cases have been brought to light since the teeth were put into the Information Act in 1974. One of the most shocking was the disclosure in 1977 of CIA files on what is called the MK-ULTRA case It has been revealed that for twenty-five years the CIA was masterminding experiments on human guinea-pigs designed to control their minds with powerful drugs. One of the subjects later committed suicide, and some subjects were chosen because they were dying Other examples are the revelation of CIA files on the planned assassination of foreign leaders and on the training of local policemen as burglars Requests under the Information Act have also shed new light on subjects as diverse as the mysterious Glomar Explorer, the Pentagon Papers, and the espionage conviction of Julius and Ethel Rosenberg

The reports to Congress required by the 1974 amendments reveal some interesting statistics In 1976, of the estimated 150,000 requests under both the Information and Privacy Acts, about 25,000 or 17 per cent were denied in whole or in part About 4,200 of these denials, or again about 17 per cent, produced appeals to the head of the organisation. In over half of these cases, the head changed the original decision and released part of the information requested (46 per cent) or all of it (12 per cent) The result is that only about 15 per cent of the documents requested were wholly denied by the departments and agencies on the ground that they fell under one of the secrecy provisions of the Act. Mainly responsible for these denials were the security and law enforcement agencies, which still deny large numbers of requests for personal documents

Because of the large number of requests under both the Acts, compliance has of course produced problems for the administration, especially the welfare, defence, treasury, security and law enforcement agencies, which receive the bulk of the requests. Thus the Department of Justice claims that, including the FBI, the amount of time it devoted to freedom of information and related privacy requests rose from 120,000 man-hours in 1975 to more

than 600,000 in 1976, and has protested that the increased workload and the potential revelation of secret information weakens its law enforcement capacity

Some agencies do not produce replies within the Information Act's specified time schedule, which they argue is unrealistic in the case of classified and personal records requiring a line-by-line review. For instance, both the FBI and the Department of Justice, to which the FBI appeals go, have been running about six to eight months behind the schedule A ruling in 1977 by the courts that the Act's time constraints are "not mandatory but directive" has certainly not helped to speed up compliance Most departments and agencies, however, have managed to stick to the schedule

Another difficulty for the departments and agencies in complying with the Acts is the cost The total cost for 1976 of handling requests under both Acts was nearly $20 million Of this, about $5 3 million was spent by the Department of Health, Education and Welfare, $4 7 million by the Defence Department, and $4 5 million by the Treasury Department But when these figures are compared with the total budgets of these departments, they turn out to be a miniscule share, far less than 1 per cent They must be weighed against the public interest to be served by releasing information and enforcing the public's right to know

Another problem is that the Information Act is being used for purposes not intended by Congress. It was expected by the Act's proponents that it would be mainly of use to the press in digging embarrassing information out of a reluctant government Instead, it has been mainly used by individuals, scholars and business firms. No one imagined the large number of individual requests that would come pouring in This was mainly due to the loss of faith in government during the Nixon years, stimulated by a number of citizen-aid groups and 'storefront' legal firms that have sprung up These organisations will pursue an appeal for a citizen, pay the costs if he loses, and collect costs at the full legal rate if he wins. Two of the most important ones are the Freedom of Information Clearinghouse and the Project on National Security and Civil Liberties Both of them distribute pamphlets to the public explaining the Act, urging people to make use of it, and even providing model request letters to government agencies The second organisation is headed by Morton J. Halperin, a former deputy assistant secretary of the Department of Defence, and has successfully appealed to the courts some of the most important cases in recent years

It was not anticipated that business corporations would make so much use of the Act They have used it not only to get general information from the government that would be of value to them, but to get information on their competitors New business and law firms have sprung up which specialise in this activity, and which carry appeals to the courts Now the competitors are fighting back with what are called 'reverse freedom of information cases', in which they seek a court injunction forbidding the government to release

requested documents, and the government is having greater difficulty in collecting sensitive information from business corporations.

The 1974 amendments were vetoed by President Ford and became law only because they were repassed in Congress by the necessary majority of two-thirds under the constitution But the Carter administration has supported the broadening of the Act. In May of 1977, Attorney General Griffin Bell issued new guidelines requiring agencies to release documents, even if they fell under one of the nine exemptions, when this would not be 'demonstrably harmful' to the government or any individuals involved He also warned that in future the Department of Justice might decide not to defend an agency in court for refusal to release documents if the Department regarded them as harmless. Until then, it had almost automatically defended all such refusals.

The general opinion in the United States is that the Freedom of Information Act as amended in 1974 and supplemented by the Privacy Act has been highly successful in meeting its objectives Many of the difficulties that its enforcement has created are temporary problems of implementation, and the others can be solved by further minor amendments to refine the law. Clearly, a strong Freedom of Information Act has not, as opponents feared, seriously slowed the wheels of government administration. Indeed, it appears to have been well accepted by most administrators, who are attempting to implement it in good faith. Many of them even admit that its effect on the administration has been salutary, and results in the preparation of better documents and reports. As Professor Anderson has noted, open records laws exert "a pervasive preventive effect by virtue of the sobering influence of prospective public scrutiny".[8]

The movement of public opinion that sired the Freedom of Information and Privacy Acts also fostered three related federal laws designed to promote openness [9] One of these is the *Federal Advisory Committee Act*, passed in 1972, which covers some 1250 advisory committees whose membership includes non-government employees. Another is the *Government in the Sunshine Act*, passed in 1976, which applies to the federal regulatory agencies and other statutory authorities These committees, agencies and authorities are now required to open their meetings to the public, except when discussing matters similar to the exemptions under the Freedom of Information Act. Also, they must keep minutes or transcripts of their meetings, and citizens have a right to challenge both the closure of a meeting and the non-disclosure of the minutes or transcript The third law, the *Family Educational Rights and Privacy Act* of 1974, requires schools receiving federal funds to permit

[8] S Anderson, "Public Access to Government Files in Sweden", *American Journal of Comparative Law*, XXI, 3 (Summer 1973), 447.

[9] See J McMillan, "Making Government Accountable—A Comparative Analysis of Freedom of Information Statutes", *New Zealand Law Journal* (1977), 287.

older students or the parents of younger students to inspect school records. The Act also contains rights to correct inaccurate or misleading records and to restrain the disclosure of personally identifiable records.

The amendment of the federal access Act in 1974 and the passage of these related federal laws have given a strong push to the movement for state laws on access to state records and personal files and on open meetings of state and local bodies A recent survey (by Plus Publications, Inc.) shows how much progress has been made by the states in passing such laws. By 1977 forty-eight states had enacted state-wide public access laws. Mississippi and Rhode Island were the only ones that had not done so. Moreover, with the passage of open-meeting laws in New York and Rhode Island in 1976, all the fifty states and the District of Columbia now have some form of open-meeting law. Also, a majority of them now have shield laws for reporters, and gradual progress is being made toward adopting laws designed to provide access to personal files and to protect the various other aspects of personal privacy.

RECENT DEVELOPMENTS ELSEWHERE

Aside from Scandinavia, three other countries of Western Europe have recently provided for a public right of access to administrative records Austria adopted limited provisions for public access in 1973, while France and the Netherlands passed full-fledged access laws in 1978. Access laws have also been approved in two of Canada's provinces (Nova Scotia and New Brunswick in 1978), and Canada's new Conservative government at the federal level introduced a Bill on the subject in October 1979. Similarly in Australia, a government Bill was placed before parliament in 1978 and separate legislation is also being considered by some of the states.

Austria

In 1973 the Austrian Federal Parliament provided a limited right to administrative information by inserting two clauses in the *Federal Ministries Act* that gave ministries a 'duty to inform'.[10] One clause requires each federal ministry to provide information to the public on request, and the other requires each federal minister to ensure that the subordinate authorities under his jurisdiction do likewise. However, this duty to furnish information is subject to the constitutional obligation of civil servants to observe official secrecy if it is in the interests of an administrative authority or the parties concerned. The Austrian government has approved a set of guidelines to implement these clauses of the Act The guidelines, however, are rather restrictive. They provide, for instance, that there is no duty to allow inspection

[10]See L. Adamovich, "The Duty to Inform in Austria as a Means of Realizing Freedom of Information", in *Proceedings of the Colloquy of the Council of Europe on Freedom of Information and the Duty for the Public Authorities to Make Available Information* (Strasbourg. Council of Europe, 1977), pp 27-37.

of documents, but only to communicate the contents of documents The obligation to furnish information only applies where the decision-making process has terminated and has led to a tangible result. Requests do not have to be met which require the evaluation of voluminous materials or the preparation of detailed papers; and an inquiry must be directed towards a specific matter.

On the other hand, a refusal to provide information can be appealed to the administrative courts This means that the public's right can be enforced and may be enlarged through judicial interpretation. Thus Austria has moved from a country where discretionary secrecy was the rule to one which now provides a limited right to administrative information.

France

Before 1978 France had the traditional system of discretionary secrecy but, as in other countries, this was combined with a number of provisions for administrative openness. For instance, municipal council meetings must be open, and new town plans have to be considered at a public inquiry. Also, individuals have access to the registers of births and deaths, and they have broad rights of access to official documents in their own case, in both the ordinary and administrative courts In recent years, however, there has been an insistent demand in responsible quarters for greater openness and a general right of public access in statutory form.

This demand gained force in 1973 when a commission for the coordination of administrative documentation submitted a report to the Prime Minister which concluded by proposing:

> the institution of a genuine right to communication for members of the public. The right's fundamental principles should be laid down by the legislature, for only intervention by the latter could make the impact necessary for the reversal of the most deeply-rooted administrative habits. The promulgation of an act on the right to information would be in keeping with a process already initiated by many liberal countries [11]

Following this proposal, the Prime Minister established a working party which in 1976 submitted a Bill and a draft decree. In 1976, too, the government announced that it would introduce privacy legislation to grant individuals a right of access to their personal files, to have them notified when information about them had been gathered, and to establish a national commission to control computer data banks.[12] This legislation was passed in January 1978 (no. 78-17).

[11]Quoted in L Fourgere, "Freedom of Information and Communication to Persons of Public Documents in French Theory and Practice—Present Situation and Plans for Reform", in *Proceedings of the Colloquy, op. cit.*, 52.

[12]McMillan, *op. cit.*, 277.

In February 1977 the government issued a decree establishing a commission charged with favouring the communication of official documents to the public This commission, chaired by M. Ordonneau, a member of the Council of State, was empowered to determine by regulations the documents to be released on request, to advise the ministers and prefects (provincial governors) on any question relative to the application of the decree, and to make proposals on the revision of the laws and regulations related to the release of administrative documents It was thus an unusual combination of an executive body, with powers to require greater openness, and a study commission that could propose amendments to the laws, and could propose a law on public access if it so chose. But the membership, consisting mainly of officials plus some members of parliament, was rather conservative and seemed likely to favour a gradual approach toward changing the attitudes and practices of public servants rather than a dramatic reform through legislation.

To the surprise of the commission, on July 17, 1978, the French parliament passed a law (No. 78-753) which contained provisions inspired by the American Freedom of Information Act, and which established a new commission to enforce the law, the Commission on Access to Administrative Documents, which is also chaired by M. Ordonneau. The Commission began its work early in 1979, even though the decree needed to give the law a more detailed specification had not yet been issued.

This law will give a much firmer foundation to the principle of public access than did the decree and commission that preceded it Like the American Act, it declares and guarantees a right to administrative documents, including documents in one's own case, subject to a list of exemptions, and it applies to all emanations of the state, including territorial collectivities The provisions requiring a reply to a request are rather strong, and there is provision for appeal to the independent administrative court system. However, the exemptions are very broad, thus giving considerable room for official discretion, and the lists of specific documents which must be kept secret are to be laid down in ministerial regulations (though these are to be framed after receiving the advice of the new commission). The new commission is charged with supervising the implementation of the law Somewhat like an ombudsman, when appealed to by a person who has had difficulty in obtaining the release of a document, it is to give its opinion to the competent authority. Also, it is to advise the authorities on the application of the law, and may propose suitable amendments to the laws and regulations.

Considering the traditional secrecy of French officials, this new law seems to be a giant step forward. But the extent to which it and the new commission will succeed in altering existing official attitudes and practices remains to be seen.

Netherlands

Like France, the Netherlands has had a system of discretionary secrecy

combined with specific provisions for openness and access. In recent years, however, there has been a strong demand for a law providing for a general right of public access to documents.

This demand took an official form in 1970 with the publication by a commission on governmental openness of a report which recommended a law on access to administrative information, and which contained a draft Bill. After considerable public discussion, the government introduced its own draft Bill on the subject in 1975. This Bill was considered by the lower house of parliament and, after a committee received the views of various organisations, was heavily amended. The lower house approved a final version in February 1977, but because of the fall of the government in that year, approval of the Bill by the upper house was delayed. However, it was finally approved in November 1978, as the *Openness of Administration Act*, to go into operation as soon as regulations under the Act had been approved.

While much like other access laws, an unusual feature of this Act is that it provides a right to the information in administrative documents rather than to the documents themselves. This, unfortunately, provides an opportunity for officials to interpret the contents of documents to suit their own interests, rather than permitting direct access to the actual documents. Also, the secrecy exemptions in the Act are very broad. Two of them are introduced by the word 'might', and are so general that the government or officials could include under them almost any information that they wished. Thus, information "shall not be divulged if it might: (*a*) endanger the unity of the Crown, or (*b*) damage the security of the State". Because of this and other provisions, Dutch legal scholars have complained that the Act is too weak to improve existing public access very markedly. One scholar has called it "whipped air and cheese, with big holes".[13]

The Act does have some strong aspects, however. For instance, it requires the publication of many types of policy documents, and its scope extends to provincial and local governments. More important, there is provision for appeal to the Supreme Administrative Court. This Court was created as a strong, independent arm of the Council of State in 1976, and from its inception has been headed by a judge who is likely to give a liberal interpretation to the Act. The broadness of the exemptions not only gives officials and ministers greater discretion, but also gives the Court greater scope for developing either a restrictive or liberal interpretation of the Act Hence the Act's success will largely depend on the independence and views of this new appeal body, which has the power to make final decisions and to order the production of documents.

An interesting provision in the Act—and an unusual one even for the Netherlands—is that the government must periodically report to parliament

[13]Quoted in a recent letter to the author from Dr Leo Klinkers, who wrote a dissertation on public access in the Netherlands

on the Act's operation. After three years, and every five years thereafter, the Ministers of General Affairs and the Interior must prepare a report which incorporates the findings of government bodies, scholars and representatives of the media and public service organisations on the implementation of the Act.

Canada

Because Canada is a federal state, each of the provincial governments has its own administrative structure, and each has the power to control public access to its own administration. Since the provinces have inherited and operate under basically the same parliamentary system as that of the federal government, their tradition of administrative secrecy has been much the same as at the federal level. Yet they have less reason for secrecy, because they are not responsible for foreign affairs, defence or national security.

Perhaps for this reason, two of the provinces—Nova Scotia and New Brunswick—have already adopted access laws, and in the most populous province, Ontario, a commission on freedom of information and individual privacy has been studying the subject and is likely to recommend such a law.

Nova Scotia

When Nova Scotia proclaimed its Freedom of Information Act in November 1977, it became the first province, and the first jurisdiction in the Commonwealth, to establish a public right of access to government documents. A noteworthy feature of this Act is that it also incorporates a right to personal privacy regarding government-held information It provides the right to inspect, correct, and limit distribution of information contained in personal files. Such information may not be disclosed, even to another arm of government, without the consent of the person concerned. The Act further provides that any agency of government must disclose the existence of all data banks where such information is kept, and it prohibits the selling or renting of a person's name or address for mailing without permission.

Another unusual feature of the Act is that it gives a list of types of information that must be made available, as well as a list of exempt categories to which the public may not have access. In a case of conflict between the two lists, however, the secrecy list takes priority. Also, most of the secrecy exemptions are couched in broad language, such as information that 'might' (rather than 'would') influence particular negotiations, or 'would be likely to' (rather than 'would') disclose a particular type of information. For these reasons, the first reading of the Bill produced an outcry from some citizens' groups, who feared that information which had been made available in the past might now be withheld. The legislature therefore passed an amendment providing that the Act would not restrict access to material that had been

available 'by custom or practice' in the past.[14]

The Act does, however, contain some strong provisions. For instance, a written request for information must be answered within fifteen working days. If only part of the information requested is exempt from disclosure, the remainder must be disclosed. If a written request for information is denied, the applicant must be advised in writing of the reasons and of the appeal procedure.

The most controversial aspect of the Act is the mechanism for appeals. An appeal must first go to the deputy head of the department, with a further appeal to the minister. If the minister upholds the denial, an appeal may be taken to the legislature, where it must be presented by a member. The theory behind this procedure is that it is supposed to preserve ministerial responsibility to the legislature, while an appeal to the courts is said to interfere with ministerial responsibility. But it is obvious that the minister will be inclined to uphold the decision of his own deputy head, and indeed will very likely have influenced the decision in the first place, so that in a sense the minister is a judge in his own case. Furthermore, if the government is supported by a majority in the legislature, an appeal to that body is not very likely to overturn the minister's decision. This appeal procedure vitiates one of the main objects of the right to force the production of documents: to prevent a minister from withholding information for personal or party advantage, or to protect his officials rather than the public interest. Nova Scotia's government is dissatisfied with the procedure and is likely to propose its amendment.

New Brunswick

New Brunswick's Right to Information Act was approved by the provincial legislature in June 1978, but had not been proclaimed by October 1979. An unusual feature of this Act is that it requires a request for information to go to the appropriate minister. An appeal from his decision may go to either the ombudsman or to a judge of the Supreme Court Where the appeal goes to the ombudsman, he will, in accordance with the usual powers of an ombudsman, make a recommendation to the minister, who must again review the case and make another decision. If still dissatisfied, the applicant can then appeal to a judge of the Supreme Court who has power to order the minister to grant the request for information

It can be seen that this procedure has the essence of the Scandinavian one, by allowing appeals to go to either the ombudsman or the courts. However, it does not make use of the ombudsman's normal functions to avoid a large number of appeals going to the ministers and to the courts. The ombudsman normally receives complaints against officials and makes

[14]See Tom Riley, "Freedom of Information: The N S Law", *Civil Service Review*, Vol. 50, No 30 (September 1977), 29.

recommendations to them, their superiors or the minister *before* the minister becomes concerned. Often a case is settled without the minister having to become involved. The requirement that a written request for information must go to a minister is severely limiting, and is likely to overload the minister. Moreover, since an appeal to the ombudsman will involve the minister in making a decision on the same case twice, applicants are likely to short-circuit the cumbersome ombudsman route and go directly to a Supreme Court judge, where they have hope of getting a favourable final determination much more quickly. If the requirement that a request must go to a minister were removed, the burden on ministers would be lifted, the ombudsman would revert to his normal role in handling complaints, and the number of appeals going to a judge would be greatly reduced.

The Federal Government

Canada's federal government is also likely to have an access law very soon In December 1975 a parliamentary committee tabled a report approving in principle the concept of such a law. This report was approved by the House of Commons in February 1976, and in June 1977 the former Liberal government committed itself to introducing some kind of Bill on the subject by issuing a Green Paper, *Legislation on Public Access to Government Documents,*[15] which presented arguments for alternative provisions in such a Bill.

The tenor of the discussion in the Green Paper, however, indicated that the government was likely to introduce a weak law. Thus, the document favoured a broadly worded list of exemptions and opposed a right of appeal to the courts, even though such a right is an integral part of the laws in Scandinavia and the United States For this reason, the Green Paper has been strongly criticised, particularly by the Canadian Bar Association and by a research study prepared for it by Professor Murray Rankin [16]

In December 1977 the Green Paper was referred for study to the Committee on Regulations, and in June 1978 the Committee reported in favour of a strong law [17] It proposed strong enforcement provisions comparable to those in the American law, and it disagreed with the broad wording of the Green Paper's exemptions and its preference for ministers making final decisions on appeals. Thus it opposed the prefacing of each exemption by the word 'might'. The Green Paper had suggested an exemption for documents the disclosure of which "might be injurious ...". The Committee

[15]Issued by Honourable John Roberts, Secretary of State (Ottawa: Supply and Services Canada, 1977), pp. 39.

[16]T. Murray Rankin, *Freedom of Information in Canada: Will the Doors Stay Shut?* (Ottawa: Canadian Bar Association, August 1977), pp. 155.

[17]Canada, Parliament, Joint Committee on Regulations and Other Statutory Instruments, *Minutes of Proceedings and Evidence,* Issue No. 34, Third Session of the Thirtieth Parliament, 1977-78 (June 27, 1978), pp. 3-12.

felt that this test was too broad and recommended that the wording should instead be "could be reasonably expected to be..." It also proposed a more restricting wording for each of the exemptions, and on the question of appeals, it proposed a combination of two of the alternatives discussed in the Green Paper: an information commissioner and appeal to the courts. The Information commissioner would have only an advisory power, like an ombudsman, but if the commissioner's recommendation that a document should be released was not accepted by a department or minister, an appeal could be made to the courts for a final decision. The advantage of having an information commissioner as an intermediate step is that he would settle most cases before they went to court, thus saving time and money. In support of a final appeal to the courts, the Committee agreed with Prof. Rankin's contention that

> no constitutional, legal, or practical impediment stands in the way of judicial involvement in the adjudication of freedom of information questions, and that the argument that ministerial responsibility precludes it is a time-worn dogma that collapses upon an examination of English and Canadian constitutional precedents. His study concludes that to hand the final decision on disclosure of information to the unreviewable discretion of a Minister "who is hardly a disinterested party" would make a sham of any system of access to Government documents.[18]

The government later announced that it planned to introduce an access Bill in parliament but had not done so by the time of its defeat in May 1979. Earlier, however, it had sponsored the passage of the Canadian Human Rights Act in 1977, which went into effect in March 1978. Part IV of this Act gives citizens the right to inspect personal files that the government may be holding on them, and to file a correction or counter statement to any information on file. A file may be withheld if its subject matter concerns any one of a long list of exemptions, but there is provision for appeal to a Privacy Commissioner who, like an ombudsman, can make a recommendation. Also, in April 1978 the government introduced a Bill, based on a report by a committee of senior officials,[19] to create a general ombudsman plan like the ones now installed in all provinces except Prince Edward Island. Under this Bill, the Privacy Commissioner would have become an assistant ombudsman. However, the Bill had not been approved by the time of the government's defeat.

In October 1979 the new minority Conservative government, headed by Prime Minister Joe Clark, introduced a freedom of information Bill

[18] Canada, Parliament, Joint Committee on Regulations and Other Statutory Instruments, *op. cit.*, 9.

[19] Government of Canada, Committee on the Concept of the Ombudsman, *Report* (Ottawa, July 1977), pp. 69.

that incorporated the main proposals of the Committee on Regulations, thus ensuring a relatively strong access law. Since the government has given the Bill a high priority in its legislative programme, it is likely to be approved soon by parliament, with minor amendments to strengthen it, and to go into effect in 1980.

Australia

A new Labour government in 1972 began a trend towards greater governmental openness in Australia. It appointed an interdepartmental committee of officials to study the problems of freedom of information, and the committee's report in 1974 favoured a freedom of information law similar to that in the United States.[20]

After Labour's loss of power, some of the initiatives towards greater openness were abandoned. Its successor government did, however, follow the lead of most of the Australian states by creating the office of parliamentary ombudsman in 1976. It also reappointed the interdepartmental committee to reconsider its earlier report, and the committee issued a second report in 1976.[21] As might be expected from a committee of officials, the proposals made in its reports were for a rather weak access law, though as a result of public discussion and criticism the proposals made in the second report were somewhat stronger.[22] These proposals then became the basis for a Bill introduced by the Commonwealth government in June 1978, *the Freedom of Information Bill* 1978 The government also introduced a related Bill, the *Archives Bill* 1978, which limits the withholding of most secret documents to thirty years.

Meanwhile, the Royal Commission on Australian Government Administration had commissioned a study on access to documents, and this was published as an appendix to the Commission's report in 1976, the same year as the second report of the interdepartmental committee The appendix was in the form of a minority report from Commissioner Paul Munro, and presented a well-argued justification for a much stronger law. It also contained a draft Bill modelled closely on the U.S. Freedom of Information Act, but with adjustments to suit a parliamentary system, and included a lengthy

[20]Attorney-General's Department, Report of Interdepartmental Committee, *Proposed Freedom of Information Legislation* (Canberra: Australian Government Publishing Service, 1974).

[21]Attorney-General's Department, Report of Interdepartmental Committee, *Policy Proposals for Freedom of Information Legislation* (Canberra: Australian Government Publishing Service, 1976).

[22]See John McMillan, "Freedom of Information in Australia: Issue Closed," *Federal Law Review*, 8 (1977), pp 379-434; and "Making Government Accountable—A Comparative Analysis of Freedom of Information Statutes," *New Zealand Law Journal* (1977), 248-256, 275-280, 286-296.

explanation and justification for each of the Bill's provisions, prepared by John McMillan.[23]

An important argument contained in the minority report, and illustrated in its draft Bill, is that any broad secrecy exemption based on a few general words, such as 'foreign relations' or 'law enforcement' will necessarily cover a large number of documents that need not be secret and ought to be released. Any such exemption should therefore be qualified by a statement of the types of documents that it does not cover, as was done in the American Freedom of Information Act by the amendment of exemption numbers 1 and 7 in 1974, and 3 in 1976. Also, officials ought to be given the permissive power to release documents, even if they seem to be covered by a broad exemption, when this clearly does no harm to a public or private interest.

As in Canada and the United Kingdom, the supporters of a strong law have formed a lobbying organisation, the Freedom of Information Legislation Campaign Committee, which has representatives from many important interest groups. It has been pressing for a strengthening of the 1978 Freedom of Information Bill through amendments proposed in parliament. However, far reaching amendments are not likely to be accepted by the government.

The 1978 Bill contains two features which may be regarded as improvements over the American legislation. The first is the more restrictive wording of some of the exemptions. For instance, the first exemption covers documents if their disclosure 'would' (rather than 'might') prejudice the security, defence or international relations of the Australian Commonwealth or its relations with any of its states. Others exempt documents only if their disclosure "would be reasonably likely to have a substantial adverse effect", or some similar wording. The second feature is that provision is made for final appeal to Australia's Administrative Appeals Tribunal, which was created in 1975, rather than to the ordinary courts. This will have the advantages of greater speed, less cost and more expertise on administrative matters.

Despite these advantages, critics of the Bill claim that other weak features, taken together, virtually emasculate it. Thus the Freedom of Information Legislation Campaign Committee has issued a 'Briefing Kit' which lists ten major faults of the Bill and explains several additional shortcomings, including some important omissions, in a clause-by-clause annotation of the Bill.[24] It concludes that "All of the major faults (and most of the equally grave ones outlined in the attached annotation) are simply the harvest of Public Service timidity and conservatism."[25]

The Australian States

As in Canada, the proposal for a federal law on access has stimulated

[23]Royal Commission on Australian Government Administration, *Minority Report, Appendix* 2 A, volume 2 (Canberra: Australian Government Publishing Service, 1976).
[24]As published in *Rupert Newsletter*, 14-16 (April-August 1978), pp. 4 5.
[25]*Ibid.*, 4.

interest in similar laws at the state level. For instance, in October 1977 the Attorney-General for South Australia, Mr. Duncan, told a public meeting organised by a freedom of information lobby that his state government was in favour of legislation on the subject but had been waiting for the federal government to produce its legislation, since his government believed that it would be desirable to have uniform legislation throughout Australia.[26] However, he did not say why his government believed that there should be uniform federal and state legislation. One of the advantages of a federal system is that there can be experimentation with different forms of new laws or institutions among the states or provinces to see which is best Also, a radical new law or institution can be more safely tried out in a single province or state. Thus the ombudsman institution was introduced first at the lower level in both Australia and Canada.

There has also been an official proposal for a public access law in New South Wales. A commission appointed to review the state's administration issued an interim report in November 1977 which made a strong case for such a law.[27] It proposed that, as the next step, it should prepare a draft Green Paper on public access to state files, incorporating a draft Bill, as a basis for public discussion.

The interim report also contained an interesting account of separate surveys of public and civil service attitudes that the commission had conducted Respondents were asked to what extent they believed members of the public should have access to state government files In the public survey, 65 per cent thought members of the public either definitely should have access to such files or an independent organisation should decide, while only 48 per cent of the civil servants thought this. Only 18 per cent of the public thought the government organisation concerned should decide, while 30 per cent of the civil servants thought this. It is likely that there would be a similar difference between public and civil service attitudes in other jurisdictions.

LESSONS FROM THE EXPERIENCE WITH ACCESS LAWS

It is clear that. because of the strength of the tradition of discretionary secrecy, most democratic countries are in need of a strong law to reverse the principle that 'Everything is secret unless it is made public by permission' to 'Everything is public unless it is made secret by law'. The lesson of the Swedish experience is that it is clearly quite possible to have a system where the principle has been reversed by law, and to build up a strong tradition of openness, without the wheels of government grinding to a halt On the other

[26]Story in *Advertiser*, November 1, 1977.

[27]Review of New South Wales Government Administration (Peter Wilenski, Commis sioner), *Interim Report: Directions for Change* (Sydney N.S.W Government Printer, 1977), Chapter 21

explanation and justification for each of the Bill's provisions, prepared by John McMillan.[23]

An important argument contained in the minority report, and illustrated in its draft Bill, is that any broad secrecy exemption based on a few general words, such as 'foreign relations' or 'law enforcement' will necessarily cover a large number of documents that need not be secret and ought to be released Any such exemption should therefore be qualified by a statement of the types of documents that it does not cover, as was done in the American Freedom of Information Act by the amendment of exemption numbers 1 and 7 in 1974, and 3 in 1976. Also, officials ought to be given the permissive power to release documents, even if they seem to be covered by a broad exemption, when this clearly does no harm to a public or private interest.

As in Canada and the United Kingdom, the supporters of a strong law have formed a lobbying organisation, the Freedom of Information Legislation Campaign Committee, which has representatives from many important interest groups. It has been pressing for a strengthening of the 1978 Freedom of Information Bill through amendments proposed in parliament. However, far reaching amendments are not likely to be accepted by the government.

The 1978 Bill contains two features which may be regarded as improvements over the American legislation. The first is the more restrictive wording of some of the exemptions For instance, the first exemption covers documents if their disclosure 'would' (rather than 'might') prejudice the security, defence or international relations of the Australian Commonwealth or its relations with any of its states Others exempt documents only if their disclosure "would be reasonably likely to have a substantial adverse effect", or some similar wording. The second feature is that provision is made for final appeal to Australia's Administrative Appeals Tribunal, which was created in 1975, rather than to the ordinary courts. This will have the advantages of greater speed, less cost and more expertise on administrative matters.

Despite these advantages, critics of the Bill claim that other weak features, taken together, virtually emasculate it. Thus the Freedom of Information Legislation Campaign Committee has issued a 'Briefing Kit' which lists ten major faults of the Bill and explains several additional shortcomings, including some important omissions, in a clause-by-clause annotation of the Bill.[24] It concludes that "All of the major faults (and most of the equally grave ones outlined in the attached annotation) are simply the harvest of Public Service timidity and conservatism."[25]

The Australian States

As in Canada, the proposal for a federal law on access has stimulated

[23]Royal Commission on Australian Government Administration, *Minority Report, Appendix* 2 A, volume 2 (Canberra: Australian Government Publishing Service, 1976).
[24]As published in *Rupert Newsletter*, 14-16 (April-August 1978), pp. 4 5.
[25]*Ibid.*, 4.

interest in similar laws at the state level. For instance, in October 1977 the Attorney-General for South Australia, Mr. Duncan, told a public meeting organised by a freedom of information lobby that his state government was in favour of legislation on the subject but had been waiting for the federal government to produce its legislation, since his government believed that it would be desirable to have uniform legislation throughout Australia.[26] However, he did not say why his government believed that there should be uniform federal and state legislation. One of the advantages of a federal system is that there can be experimentation with different forms of new laws or institutions among the states or provinces to see which is best. Also, a radical new law or institution can be more safely tried out in a single province or state. Thus the ombudsman institution was introduced first at the lower level in both Australia and Canada

There has also been an official proposal for a public access law in New South Wales A commission appointed to review the state's administration issued an interim report in November 1977 which made a strong case for such a law[27] It proposed that, as the next step, it should prepare a draft Green Paper on public access to state files, incorporating a draft Bill, as a basis for public discussion.

The interim report also contained an interesting account of separate surveys of public and civil service attitudes that the commission had conducted. Respondents were asked to what extent they believed members of the public should have access to state government files. In the public survey, 65 per cent thought members of the public either definitely should have access to such files or an independent organisation should decide, while only 48 per cent of the civil servants thought this Only 18 per cent of the public thought the government organisation concerned should decide, while 30 per cent of the civil servants thought this. It is likely that there would be a similar difference between public and civil service attitudes in other jurisdictions

LESSONS FROM THE EXPERIENCE WITH ACCESS LAWS

It is clear that, because of the strength of the tradition of discretionary secrecy, most democratic countries are in need of a strong law to reverse the principle that 'Everything is secret unless it is made public by permission' to 'Everything is public unless it is made secret by law'. The lesson of the Swedish experience is that it is clearly quite possible to have a system where the principle has been reversed by law, and to build up a strong tradition of openness, without the wheels of government grinding to a halt On the other

[26]Story in *Advertiser*, November 1, 1977.

[27]Review of New South Wales Government Administration (Peter Wilenski, Commissioner), *Interim Report: Directions for Change* (Sydney. N S W Government Printer, 1977), Chapter 21.

hand, experience elsewhere, especially in the United States, teaches us that where such a tradition of openness does not already exist, the full establishment of the principle of public access will require a radical change in law, practices and attitudes. Although practices and attitudes may not be changed sufficiently by the mere passing of a law, this is a necessary condition for the change. The adoption of a law which clearly declares a reversal of the principle of secrecy has great symbolic and dramatic value in altering both public and official attitudes. But as shown by the failure of the first American law of 1946, and the limited success of the law of 1966 until its amendment in 1974, such a law will not succeed unless it contains strong provisions for its enforcement. Public officials are too used to the old system of discretionary secrecy under which they arbitrarily withhold information for their own convenience or for fear of disapproval by their superiors, and will not change their ways unless they are required by law to do so.

Another lesson of experience elsewhere is that under a parliamentary system, where the executive government controls the introduction of legislation, the government will resist sponsoring a strong law because this will limit its own powers, and because it finds the present system of discretionary secrecy so much to its own advantage. It is significant that all of the governments in parliamentary systems that have sponsored or drafted an access law have produced weaker versions than the laws of Sweden or the United States. Such governments are likely to resort to the spurious argument that a right of appeal to the courts will interfere with ministerial responsibility to parliament. Yet such a right increases rather than interferes with ministerial responsibility because it prevents the ministers from permanently hiding information for personal or partisan advantage. And from a broader point of view, a strong access law forces them to release more information about all of the activities for which they are responsible, thus giving parliament, and through it the public, a better basis for controlling the government

Experience elsewhere also shows that a strong and successful law must have five main features. First, it must unequivocally declare that the general principle in government administration is to be open public access to information and that secrecy is the exception. Second, it must facilitate full and easy public access, for instance by not limiting requests to specific documents (as in Denmark and Norway) or to citizens with a personal interest in a case, and by requiring public registers of all documents and low fees for searches and copies, with the fees waived if the request is for a public purpose. Third, it must list narrowly and specifically the types of documents that may be kept secret, must specify how long they are to be kept secret, must permit earlier release if this does not harm the public interest, and must require non-secret parts of documents to be released. Fourth, it must contain strong provisions for the enforcement of access, such as a limited time for replying to a request or appeal, and requiring reasons for a refusal, as well as penalties for non-compliance. And fifth, it must provide an easy appeal to an independent

authority, including a final appeal to the courts, with the costs recoverable if the applicant wins.

Moreover, if there is to be full provision for openness, the scope of the law should be broad. Unless separate laws are passed for the purpose, it should contain provisions for access to personal files, and for their correction and control, for open meetings of governmental bodies and for extending its scope to cover state and local government. Finally, existing laws must be made to conform with the new access law. Because of cabinet control over the drafting of legislation in parliamentary countries, even the statutes are slanted in favour of discretionary secrecy. For example, in Ontario a research group has found that, of some 500 provincial laws at present in force, one in every four contains some provision for administrative secrecy, and twenty-nine of them contain broad secrecy language.[28] Hence, if a parliamentary country adopts an access Act, either its existing laws and regulations should be reviewed and their secrecy provisions brought into conformity with the spirit of the new Act, or the Act should be made to override these provisions.

□

Democracy and Secrecy

A totalitarian government finds it easy to maintain secrecy. It does not come into the open until it chooses to declare its settled intentions and demand support for them A democratic government, however, though it must compete with these other types of organisation, has a task which is complicated by its obligations to the people. It needs the trust of the governed It cannot use the plea of secrecy to hide from the people its basic aims.

—The Franks' Committee, U.K. 1972

[28]Ontario Commission on Freedom of Information and Individual Privacy, *Newsletter No* 3 (August 1978), 9.

Secrecy and Publicity in a Parliamentary Democracy—the Case of the Netherlands

B.J.S. Hoetjes

IF ONE were to write exclusively on those things in Dutch government which remain secret, the following pages would have to remain blank, since, by definition, secrets are unknown. In order to throw some light on the problems of secrecy it seems more fruitful, therefore, to turn our attention to the limits of secrecy and publicity and their conflicting interests in Dutch society and government.

Secrecy and publicity are not confined to the realm of government—they may also characterise a society at large. In most, if not all, societies most events and phenomena are ignored by most people and seen, noticed and known only by a few. There are several reasons for this. Ignorance may be due to social and cultural distance: a person will be highly interested in, and therefore better informed about, many events in his family circle, home town or village, but he will ignore most phenomena at the national or international level, because he feels unrelated to them. A low level of education and also a highly specialised education will make a great deal of information incomprehensible, and therefore inaccessible to a person, because it is either too complicated or outside the limits of one's own specialised interest. Also, habit and prejudice may form a filter in people's subconsciousness, through which information is selected, and, to a great extent, excluded and ignored. Indeed, when the human mind is confronted with an increasing flow of information, some selective mechanism, excluding 'unimportant' things, might be essential for mental survival.

However, aside from voluntary or unconscious ignorance, information may be kept away from people wilfully and consciously, *i.e.*, by making and keeping things secret

There may be various reasons and motives behind secrecy. In the first place, a feeling of shame may be the reason: one keeps away from others those things, which, one expects, will be shocking to others and therefore disapproved. This expectation may be right or wrong, but that is not the main point: before any question arises, one hides a thing in secrecy in order to prevent social disapproval and punishment.

Secondly, the desire to maintain a certain independence towards other

people may explain secrecy—especially in strictly personal matters the concept of 'privacy' and the legislation in the Netherlands, protecting the personal, private sphere and keeping private information out of the public's reach, is based on this desire.

Thirdly, and most importantly for our topic, the desire to exert power or influence may be the motive behind secrecy: one may enhance one's power/influence by keeping certain actions and intentions secret altogether or by revealing information only partially or at one specific moment (*e.g.*, using surprise tactics). Here, it becomes difficult to draw the line between secrecy and manipulation, *i.e.*, a wilful distortion of reality intended to influence the observer of this 'reality'. For example, a civil servant, advising his minister, may withhold information and, by doing so, he may reduce the number of alternatives for the minister's decision, and influence this decision in the direction he, *i.e.*, the civil servant, prefers.

Information about policy problems, available alternative courses of action and the consequences of these alternatives; political as well as economic and social, provides the raw material for decision-making and the better the raw material, the better, *i.e.*, the more self-conscious, responsible and deliberate, the decision will be.

PARLIAMENTARY DEMOCRACY AND PUBLICITY

The more a public office holder is trusted, the more his authority is taken for granted and the less he is inspected and supervised, the greater will be the chances of secrecy and manipulation. Therefore, institutionalised opposition, public accountability and publicity will minimise this chance, and the more so, when they support each other. More particularly, opposition in parliament will only be effective when governmental accountability to parliament also implies a duty for the government to provide all the desired information. According to Art. 104 of the Dutch Constitution, the ministers have to provide the desired information to the Estates-General (*i.e.*, the parliament), unless this may be held to damage the national interest. The government has to justify its actions publicly, since, according to the constitution, the meetings of parliament shall be held in public (Art. 111).

As far as the relationship with the general public is concerned, the government is constitutionally bound to publish all laws and regulations in the 'Staatscourant' which can be obtained by every citizen. Also, the proceedings of all courts of justice are held in public (except in legally circumscribed cases, where the interests of children/minors or national security are involved).

As a logical consequence of this governmental publicity, it is assumed that every Dutch citizen knows the law—ignorance is not acceptable as an excuse. However, in spite of the high education and almost complete literacy of the population, not every Dutch citizen knows all the rules of the law—in fact, only the lawyers do. There is a wide gap between publicity on

the one hand and knowledge and familiarity with public affairs on the other, and it is felt that communication, information and education in public affairs should bridge this gap.

Still, there is a widespread reluctance and even resistance against direct governmental activity in the field of communication and information in the Netherlands: the fear of manipulated information and government propaganda, and the desire to keep the mass media independent are deep-rooted. Press, radio and television are in private hands (either profit-oriented or non-profit organisations) and organisationally as well as economically they are highly, although not completely, independent from the government.

Government, *e.g.*, the prime minister, will rarely, if ever, address the people directly by press, radio or television. The 'Staatscourant', which publishes the laws and regulations, cannot stand a comparison with the newspapers—it is a book-of-law in the form of a daily paper more than anything else—and the broadcasting time on radio and television that is used by the government, is very limited in the first place and, secondly, it is mainly handed over to the political parties for their propaganda. The very little radio and television time, used by the government itself, is devoted completely to non-controversial matters like rural extension services, social security or credit facilities offered by the government. For the contacts between government and the mass media there are public relations/information services in each ministry as well as a general governmental information service. These services are meant to 'publicise, explain and elucidate' the policy decisions of the government, but they are not to applaud or propagate government policy among the citizenry. Even the notion of 'public relations', *i.e.*, systematically improving the relations between the government and those groups on whose opinion and goodwill the government, as an organisation, depends, is widely held in distrust. Every attempt by the government to influence the citizens directly—by-passing parliament—is generally considered to be incompatible with the Dutch parliamentary system.

Thus, the mass media in the Netherlands are quite independent from the government. Also, there is considerable diversity among the mass media, reflecting the social, religious and political diversity in this small country (14 m. inhabitants): 7 national newspapers and 9 national broadcasting organisations, each of them quite distinct in its views and identity, exist side by side with numerous regional and local newspapers and radio stations. The government, on its part, explicitly recognises and appreciates this diversity, even to the extent of subsidising newspapers which are in financial difficulties. Although no political strings are attached to these subsidies, there is considerable uneasiness about this financial involvement of government in media affairs. Legally, the independence of the Dutch press is guaranteed by the constitution (Art. 7 concerning the freedom of the press) and the European Convention for the Protection of Human Rights (Art. 10 concerning the freedom to collect information)

By the way it should be noted that the influence of the media on government policy has its limits as well. Although the media are highly effective in exposing official misconduct and urging parliament (or provincial/municipal councils) into action on matters of public indignation, the daily newspaper comments on matters of public importance (editorials) are hardly read by the general public. For most readers, government, politics and administration are completely uninteresting compared with the sports page.

LIMITS AND SHORTCOMINGS OF PUBLICITY

Education, literacy, publishing and mass media activity have reached a very high level in this prosperous, privileged, humid and chilly corner of northwestern Europe Still, the average Dutch citizen does not use all the available information all the time—one simply cannot always be interested and informed about everything. The demand for more information about public affairs originates from a small group in the population, namely, the politically interested citizens. However small this group may be (certainly not more than 10 per cent of the population), for the viability of the governmental system it plays a crucial role; therefore, its voice should be, and has been, heard.

The amount of information on public affairs, large though it may be, is not unlimited; in spite of the public accountability of government at the national, provincial and local level, much escapes from the public's eye. First of all, this is caused by the phenomenon of *delegation*. the more complicated and comprehensive government policy has become, the more regulating and decision-making has been shifted, 'delegated', to civil service agencies. However, the civil servants are not legally responsible for policy decisions: only the (under-)ministers can be held responsible for policy-making vis-a-vis parliament. In this respect the Dutch situation is different from Sweden, where each individual civil servant has a public responsibility for his decisions and where, consequently, the role of parliament in governmental affairs is much more limited; in fact, the Swedish parliament confines its discussions to current political controversy. In the Netherlands, however, the (under-) minister in his role of political executive is held responsible for everything that goes on inside his ministry. Political executives are supposed to know, supervise and direct every action by any of their numerous officials and these officials, in their turn, are responsible only to their political executive; they don't have to answer anyone else's questions and it is their duty to keep all official matters secret. In actual practice, of course, a minister is unable to know everything that goes on within his ministry and, as a result, a lot of decision-making, especially 'delegated' decisions, have become completely inaccessible to the outside world.

At the same time, it should be granted that official resistance against attempts to change this situation is quite understandable, since the present

situation at least offers formally clear lines of exclusive responsibility. A civil servant would be in a rather uncomfortable position if he would have a dual responsibility, *i.e.*, to the public as well as to his political executive. Also, this inaccessible decision-making, which takes place within governmental services/ministries, rarely creates difficulties as far as publicity is concerned—the more complete the public's ignorance, the less a need for information and publicity. For a public servant to bring out all possibly relevant information without the public asking for it, would require quite a change of mentality.

Secrecy and publicity become an issue in two possible situations. First, there is the possibility that a citizen or a group of citizens disagrees with a governmental decision. In such a case there is a procedure for appeal to higher authorities and/or a court of appeal, and there is a system of elaborate legal rules to deal with such a possibility; also, the aggrieved citizen may turn to party politicians or mass media for assistance.

Secondly, however, there is the situation where a citizen requests a service from the government (*e g* , a licence, a subsidy) and all he can observe after submitting his request is the final decision (refusal or approval). Especially this type of 'interested citizen' feels a great need for information about what went on before the final decision—which officials took care of his request, why did it take such a long time, how was the request dealt with, what motives led to the final decision, etc Asking for this kind of information, a citizen may run into a wall of secrecy, which is certainly, not inevitably, built on official ill-will towards the citizenry There are other reasons for this non-responsiveness: formal decision-making in bureaucratic administrative bodies has been split up into many parts, so that every single official is concerned and informed only about a very limited aspect of the matter . he is simply unable to inform a citizen about the whole process of decision-making. Aside from that, he has no duty to provide information to anyone except his formal superiors, and ultimately, the politically responsible executive. The Dutch constitution gives the citizen a right to present requests and petitions to the authorities, but a right to receive an answer is not mentioned nor is there a constitutional obligation for the government to provide an answer. At this point politicians as well as lawyers and public administration experts have argued strongly, and probably successfully, in favour of changing the constitution.

There are more limits to publicity in Dutch government. The citizen can try to obtain information through his representatives in parliament (or provincial/municipal councils, as the case may be) but there he will find the political parties standing in his way. According to the constitution, there is a direct, individual, relationship between the citizen and his representative in parliament; political parties do not exist in any constitutional sense. Still, it is they who mediate between the citizen and the representative in actual practice. A citizen votes for a party list (he does not know the candidates

personally) and a representative in parliament operates along party lines (he owes his position to the party and he will therefore conform to party discipline) Now, the political parties are not obliged to make all their information public or to make it available to interested citizens—they are completely free to withhold information or to select it according to their views.

Even in the relationship between parliament and government, publicity has its limits. The plenary sessions of parliament are held in public, although committee meetings may be held behind closed doors if the subject requires (*e.g*, personal or security matters). The formation of cabinets, however, which is a crucial decision-making process involving the party leaders in parliament, takes place in almost complete secrecy. Also, the cabinet meetings are kept secret: no agenda or reports/minutes are published. Only since 1970 has it become a custom for the cabinet to inform the press and television journalists. This custom, however, has no legal basis whatsoever; availability of information about a minister's activities depends on his/her spontaneous talkativeness and the vigilance and diligence of parliament. Finally, the contacts between the cabinet and the queen, who is constitutionally 'immune' as the head of state, as well as with the queen's advisers, *e.g.*, the Council of State which offers advice on all legislative proposals, are kept secret altogether.

RECENT CHANGES

Arguments for publicity and against secrecy have been heard for a long time. In the 19th century, the famous liberal Prime Minister Thorbecke was a strong spokesman for publicity: he was the main force behind the legal and constitutional changes in that direction The provisions concerning publicity and information in the Dutch Constitution—(1848), the Provincial Act (1850) and Municipal Act (1851) are due to him.

In the 20th century, considerable criticism of the 'bureaucratic jungle' (morass or swamp would be a better term in the case of the Netherlands) remained, but only after 1960 it gained more ground, especially when the demand for 'democratisation' of universities and other public bodies became the issue of the day at the closing of the sixties.

In 1968 Prime Minister De Jong installed a committee to advise the government in the field of publicity and information This committee submitted its report 'Openheid en Openbaarheid' in 1970—it recommended a basic change away from the current principle of 'secrecy, unless publicity is necessary' to the principle of 'publicity, unless secrecy is necessary'. The committee argued for new legislation in the field of governmental and administrative publicity. A new law should oblige the government to provide, on its own initiative, information about its policies, about the non-official advice in matters of public policy, as well as about its policy intentions for

which public discussion is desirable; aside from this so called 'active publicity', the citizen should have a right to be informed about governmental/administrative actions on his request ('passive publicity').

After receiving the report and submitting it to parliament, the cabinet (-De Jong) declared its intention to propose legislation on the matter of 'active publicity'. The notion of 'passive publicity' was left out because there were objections from within the cabinet and the Council of State against the highly general 'right to be informed' for any citizen (at least, so it appeared). Parliament was quite satisfied with the committee's report, but it took several years, and two more prime ministers, before a legislative proposal was presented to parliament by the cabinet (den Uyl) in 1975.

The proposal for a Publicity of Administration Act—1975 attempted to relate the interest of publicity to other, sometimes conflicting, interests, like the need to integrate all the interests involved in a policy question according to the views of the government, the need to coordinate the policies of the various ministries and the constitutional necessity of unambiguous accountability of governmental policy towards parliament. Dealing with these problems, the Act has looked for support and guidance in the Scandinavian legislation on publicity in public affairs—no other country in the world has legislated on this matter. The Dutch Act is more moderate than the Swedish Act, where the role of parliament in administrative matters has been very limited for a long time and where the press is considered to be a 'constitutional force', but it goes somewhat further than the Danes, the Fins and the Norwegians.

The exact wording of the 'right to be informed' will be left to administrative regulation (algemene maatregel van bestuur), taking into account a number of principles, *e.g.*, the exclusion (from publicity) of information about individual official opinions on policy matters (these are not excluded in Sweden) and information which is incomplete or not yet finalised, and the inclusion of information about available alternative courses of actions and the motives for a decision. Also, the concept of 'official document' is important in this context, even though 'information' covers more than written documents only A piece of writing becomes an official document when it has been sent or handed over formally and can be assumed to have been received by the addressed person. A piece of writing, which has not been formally sent and/or received, will thus not qualify as an official document and will be excluded from publicity.

The proposed Act was studied by a committee of parliament, which reported on the matter in March 1976 At that time, the government was supported by the socialists (Labour Party), the radicals (PPR), the two Christian-democratic parties (Roman Catholic—KVP, and protestant—ARP) and the leftist liberals (D'66), while the conservative-liberals (VVD), one protestant party (CHU) and splinter groups on the left and the right opposed

the government; the committee 'openheid en openbaarheid' had been sponsored by the Roman catholic-protestant-conservative liberal (KVP-CHU-VVD) Cabinet-De Jong. The proposed Act, therefore, could muster a large majority of parliament in 1975. Objections and hesitations were voiced mainly by the KVP and the VVD, although they were basically in favour of the Act, the other parties were either fully satisfied (Labour, ARP) or wanted the Act to go further (D'66, PPR, leftist groups) without being against it as it was. The leftist liberlals (D'66) did not want to leave the exact wording of the 'right to be informed' to administrative regulation: this procedure might create the impression that government is in favour of publicity, but leaves open numerous possibilities for it to withdraw into secrecy.

Responding to the comments from the parliamentary committee, the government made some minor changes in the Act: it now covers municipal, provincial as well as national administration and the notion of a permanent supervisory board on publicity was left out. In February, 1977, parliament (*i.e* , the second chamber) discussed the proposal in its public, plenary session and the proposed Act was adopted without the taking of votes (February, 17, 1977) The first chamber of the Dutch parliament discussed the matter in the course of 1978 and agreed with the proposal by the end of that year (November 7, 1978) Since that day, the Dutch have a law on publicity in public administration. The administrative regulation concerning 'passive publicity' is not yet finished at this moment.

Around the same time the cabinet came up with the idea of adding an Article to the constitution concerning publicity in public affairs. This Article, completing the legislative provisions for publicity, should oblige government to act according to the legal rules of publicity. The Council of State was in favour of this idea (January, 1977), but the special committee of the second chamber discussed the matter only at the end of 1978—after a cabinet crisis and the formation of a new ministry of Christian-democrats (CDA) and conservative liberals (VVD).

The majority of parliament is in favour of the new Article (June, 1979), but in the plenary session there has not yet been a discussion or vote on this subject.

the Dutch parliamentary system. This need for independent information has now found its way into legislation.

This does not imply that government and administration in the Netherlands now find themselves in a 'glass house'. A great deal of information still escapes the public eye, and although this may be undesirable from the viewpoint of the journalist or the interested citizen, there may be good reasons for it from other viewpoints like the protection of private persons or national security. The 'black box of government' has not become completely transparent, but, as things stand now, the rights and duties of information for officials and citizens have been more clearly defined in the law; they are no longer completely left to the whims of convention and discretion.

LITERATURE

B de Goede (red.), *Hoe openbaar wordt ons bestuur ?* Den Haag, z.j.

I. Galnoor (ed.), *Governmental secrecy in democracies,* New York, 1977, esp the contribution by H A. Brasz.

Handelingen van de Eerste en Tweede Kamer der Staten-Generaal, zitting 1974-1975 e v., verslag + bijlagen onder nrs. 13 418 en 14.348.

L E M Klinkers, *Openbaarheid van bestuur* (diss.), Utrecht, 1974.

H van Maarseveen en H C. Oortgijs, "Privacy, beslotenheid en staatsrecht", in: *Nederlands Juristenblad* November, 4, 1972.

J. van Putten, "Openbaarheid en publiciteit", in: A. Hoogerwerf (red.), *Verkenningen in de politiek* Alphen aan den Rijn 1972, p. 216-224.

J. van Putten, "Democratie en openbaarheid van bestuur", in: *Civic Mundi*, September 1975, p 165-170.



Access to Administrative Information

The Netherlands Law on the Access to Official Information was passed in November 1978. *Article* 1 says: 'a request for information ... shall be complied with unless there is an objection to this on any of the grounds referred to in *Article* 4'. *Article* 4 says that the information . shall not be divulged if it might: (*a*) endanger the unity of the crown, (*b*) damage the security of the state, or if it concerns, (*c*) data of enterprises and production processes insofar as they have been furnished to the government confidentially.

Government Secrecy in Canada

Gordon Dohle

AT THE philosophical level, the practice of government secrecy in Canada is a compromise between the concept of liberal democracy and the tendency to oligarchic behaviour in the British parliamentary tradition The compromise is an unstable one, beset by the constant tension between theory and practice As a modern liberal democracy, the political culture of Canada is said to be based on a belief in 'popular sovereignty'—"a form of government which attempts to maximize or 'optimize' the common good by satisfying the needs of as many people as possible"[1]—and achieved through representative government.

In contrast to this belief, however, there exists the practice of 'crown privilege' and administrative secrecy which allows the government to maintain control of information vital to a citizenry concerned with popular sovereignty. It is difficult to comment on, criticise or effect change in policies whose very existence is shrouded in secrecy

This contrast between theory and practice in the Canadian context arises primarily as a result of historical forces As a parliamentary democracy in the Westminster model, created by an Act of the British Parliament in 1867, many of the contradictions in that model have been imported and remain firmly rooted in the Canadian consciousness There is, for example, no scholarly agreement as to whether the Canadian political tradition is based on 'popular sovereignty' or 'parliamentary sovereignty'.[2] Depending on one's interpretation of this important base, the 'right' to information and the practices of administrative and ministerial secrecy take on different meanings.

A modern corollary is that the concept of fiduciary trust inherent in liberal democracy leads in practice to the development of elites whose main activity is to coordinate the interests of the groups they represent with the economic well-being of the system. There is a growing amount of evidence[3]

[1]R J Van Loon and M.S Whittington, *The Canadian Political System: Environment, Structure and Process*, 2nd edition, McGraw-Hill Ryerson, Toronto, 1976, p 78.

[2]See D V Smiley, *The Freedom of Information Issue A Political Analysis*, Ontario Commission on Freedom of Information and Individual Privacy, Toronto, 1978, p 38.

[3]See, *e g* , J Porter, *The Vertical Mosaic*, University of Toronto Press, Toronto, 1965, and W. Clement, *The Canadian Corporate Elite*, McClelland and Stewart, Toronto, 1975

as to the homogeneity of the Canadian ruling elite and their horizontal mobility in sectors including government, business and the academy. To the extent that access to information depends on positions of power there are grounds for believing that knowledge of nominally secret government information is freely available between and amongst these elites.[4]

On balance, most observers of the practice of government secrecy in Canada would agree that:

> Governmental secrecy in Canada is based largely on British parliamentary practice: the common law doctrine of crown privilege, the traditions of ministerial responsibility and of an anonymous civil service, the principle of the freedom of the press, the Canadian version of the British Official Secrets Act, and a system of classification for government documents. The prevailing view among scholars is that Canadian public bureaucracies are excessively secretive and that Canada's official information policies reflect traditional concepts and a slavish adherence to bureaucratic secrecy.
>
> Common law traditions of crown privilege recognize the right of the crown to refuse to disclose classified information where it is felt that disclosure would be detrimental to the public interest The concepts of ministerial responsibility and civil service anonymity have, in part, contributed to the general assumption that all documents are secret unless they are specifically declared to be public. These concepts also mean that opposition politicians are less able to question or criticize public servants than in other systems of government[5].

This observation is of course tempered by the understanding that *some* degree of administrative secrecy is necessary in order to preserve the anonymity of civil servants, national security, the timing of government action in areas dealing with important economic measures and federal-provincial relations. Nevertheless, the amount of secrecy and the principle by which it is to be administered has become a matter of widespread debate in Canada. As Professor Rowat has put it:

> There will always be the problem of drawing a line between the Government's need to deliberate confidentially and the public's need for information. It is simply a question of emphasis. In the past we have been stating the principle the wrong way around: 'Everything is secret unless

[4]Porter, op cit; Clement, *op. cit*, and see also C. Campbell and G.J. Szablowski, *The Super-Bureaucrats Structure and Behavior in Central Agencies*, Macmillan, Toronto, 1979, and F.C Engelmann and M A Schwartz, *Canadian Political Parties Origin, Character, Impact*, Prentice-Hall, Scarborough, 1975.

[5]G B Doern, "Canada", in Itzak Galnoor, ed, *Government Secrecy in Democracies*, Harper and Row, New York, 1977, p 145-146.

it's made public,' instead of, 'Everything is public unless it's made secret.'[6]

Historically, the tradition of secrecy has been associated with crown privilege. As such it was a kind of 'unwritten rule' which was buttressed by the British courts in 1942 and the tradition extended to Canada.[7] Elements of secrecy can however be found embedded in Canadian law as early as 1890 and the Canadian Bar Association in a recent survey lists over seventy separate enactments containing provisions for secrecy.[8] Those having the most important bearing on proposals for freedom of information in Canada include the Federal Court Act, the Official Secrets Act and the Public Service Employment Act.

THE PUBLIC SERVICE EMPLOYMENT ACT

This Act[9] is a blanket oath of allegiance and secrecy which serves to demonstrate the ethic of secrecy in Canadian government. As a condition of employment all civil servants are required to take the following oath of secrecy:

> I . . . solemnly and sincerely swear that I will faithfully and honestly fulfill the duties that devolve upon me by reason of my employment in the Public Service and that I will not, without due authority in that behalf, disclose or make known any matter that comes to my knowledge by reason of such employment.[10]

The comprehensive nature of the oath, the emphasis on *any* matter, makes it difficult for any civil servant to disclose *any* bit of information and serves to justify the actions of those who prefer not to be bothered by citizens seeking information. A parallel oath, taken by members of the Privy Council which includes all cabinet ministers, reinforces the ethic of secrecy:

> I will keep close and secret all such matters as shall be treated, debated and resolved on in Privy Council, without publishing or disclosing the same or any part thereof, by Word, Writing, or any otherwise to any

Person out of the same Council, but to such only as be of the Council.[11]

The result of these two oaths taken together is that ministers of the crown can depend on close-lipped servitude from their minions in the development of government policy and have no requirement even to members of their own party in government to disclose the background reasons for any of their legislative behaviour The principle of a 'loyal opposition' dutifully debating government bills is thus further eroded. Opposition parties in Canada must perforce employ their own talents to unearth and disclose the reasons behind policy decisions.[12]

Authority to disclose information is allowed for in the Public Service Employment Act but it should be noted this is an allowance, not a requirement In practice it creates specialised propaganda units whose task often appears to be one of maintaining good public relations without disclosing anything of interest to anyone. When civil servants nominally or traditionally authorised to discuss activities in their departments do so without discretion they can be subject to extremely strong pressure. This is particularly true during times of government crisis and during transition periods. Not long after the recent change in government in Canada, for instance, a memo was circulated warning civil servants to refrain from making policy comments. The contents are instructive in that they reinforce the oath of secrecy and at the same time show the degree of control over information which is wielded by the prime minister's office:

> Officials who are not designated to deal with the media as part of their duties, and who receive media inquiries will refer them to public affairs;
> Generally officials will not give on-camera or on-mike interviews;
> Officials who are required to deal with the media as part of their duties or requested to do so by the minister will confine themselves to factual explanations and avoid commenting on or promoting policies;
> All public announcements at the national level and all policy or major programme announcements will be made by the minister,
> Press releases of such announcements will be cleared via the Director General of Public Affairs and with the Prime Minister's office.
> Wherever possible the Prime Minister's office should receive the draft press releases at least 24 hours before their scheduled release.
> Scheduled media interviews with national audiences on ranges of subjects going beyond the minister's departmental responsibilities . are to be coordinated by the Prime Minister's office.[13]

[11]*The Citizen*, Ottawa, June 9, 1979

[12]A document, "Guidelines for the Production of Papers in Parliament", was tabled in the House March 15, 1973

[13]*The Vancouver Courier*, August 3, 1979.

THE OFFICIAL SECRETS ACT

This Act[14] is designed primarily to protect Canada from espionage activities. Although charges under it are unusual, it is important because it invokes heavy penalties for spying and is written so broadly as to

> embrace in intent almost any form of information obtained in the course of service or contract of employment, or otherwise, and then passed on without authority to any other person whatever his status and whatever the purposes of the transfer of information may be, however unclassified the information may be, if obtained from sources available because of holding a government position or having a government contract.[15]

A recent comment on the Act sees it as a potentially draconian measure to keep civil servants in line.[16] There is little doubt about the efficacy of such a measure:

> Section 4 is drafted so broadly that it could prohibit the communication of any form of information obtained in confidence from any person holding office under Her Majesty. Prosecutions under the act are rare but public servants are conscious of its existence and are no doubt influenced by it The size of the penalties involved—a maximum sentence of fourteen years—must serve to make public servants cautious.[17]

Perhaps the most telling comment on the inherent ambiguities in the Official Secrets Act is a recent court case in Canada Peter Treu, a consulting engineer who had been granted a security clearance to receive NATO documents found himself charged under the Act. Treu was subjected to a secret trial, charged with illegal possession and inadequate protection of secret information, and sentenced to 2 years in prison. He appealed the case and "the appeal court cleared Treu of any criminal intent because his security classification had been eliminated without his knowledge and it ruled he had, in fact, conscientiously kept the documents under lock and key."[18]

What was at issue here was the problem of security classification[19] and the means of administering the Act. Treu's security clearance had been

[14] *Official Secrets Act*, R S C. 1970, c 0-3.

[15] M. Cohen, "Secrecy in Law and Policy. The Canadian Experience and International Relations", quoted in Doern, *op cit*, p 146

[16] *The Vancouver Sun*, August 8, 1979.

[17] R T. Franson, *Access to Information, Independent Administrative Agencies*, Law Reform Commission of Canada, Minister of Supply and Services, 1979, p 53

[18] *Maclean's*, March 5, 1[illegible]

[19] For a discussion of [illegible] ssification System, see Rankin, *op cit.*, p. 34, and Rowat, *op. cit.*, pp. 4[illegible]

revoked without his knowledge and without the knowledge of NATO officials, who continued to send him classified information. The reason for revoking the clearance remains unexplained but the lesson for civil servants bound by the Act as well as by their oath is clear. Treu declared:

> I learned my lesson. As long as there are civil servants who can withdraw a person's security clearance without informing them, everyone working on classified projects will continue to have one foot in jail.[20]

State security is undoubtedly important. The problem in Canada is that its imputed importance is shrouded in a form of secrecy which gives rise to infringement of civil liberties. The imposition of the War Measures Act in 1970 included an infringement on the freedom of the press and demonstrated the capability of government to become the absolute arbiter of what constitutes information.[21] It also appears to have created within the security agencies of the state a belief in their status above the law. Two contemporary judicial inquiries have been offered testimony which indicates a belief within the royal Canadian mounted police that "the RCMP Act over-rode all other legislation".[22] There is also widespread suspicion that ministers of the crown may have known about and condoned illegal activity on the part of the RCMP.[23] It is not clear what part of this problem relates to state security and what part to political considerations and the concept of crown privilege.[24]

THE FEDERAL COURT ACT

The Federal Court Act[25] of 1970 is an attempt in Canadian jurisprudence to institutionalise the concept of crown privilege and to specify those areas which are exempt from this principle of secrecy. The Act specifies ways in which the courts may determine if information claimed to be privileged may be adjudicated as such Section 41 of the Act provides:

> 1. Subject to the provisions of any other Act and to sub-section (2), when a Minister of the Crown certifies to any court by affidavit that a document belongs to a class or contains information which on grounds of a public interest specified in the affidavit should be withheld from production and discovery, the court may examine the document

[20]*Maclean's*, March 5, 1979.

[21]For an extended discussion of the *War Measures Act* and Freedom of Information, see Doern, *op. cit*, p 147-148.

[22]*Weekend Magazine*, ("The Canadian" February 3, 1979)

[23]*Maclean's* April 16, 1979

[24]John Hogarth, "The Individual and State Security", *Social Sciences in Canada*, Vol. 7, No 1, March 1979, pp 10-11.

[25]*Federal Court Act*, R S C 1970, c 10 (2nd Supp.).

and order its production and discovery to the parties subject to such restrictions or conditions as it deems appropriate, if it concludes in the circumstances of the case that public interest in the proper administration of justice outweighs in importance the public interest specified in the affidavit.

2. When a Minister of the Crown certifies to any court by affidavit that the production or discovery of a document or its contents would be injurious to international relations, national defence or security, or to federal-provincial relations, or that it would disclose a confidence of the Queen's Privy Council for Canada, discovery and production shall be refused without any examination of the document by the court.[26]

The wording of Section 41(2) is especially important because it allows absolute discretion on the part of the minister to determine what might be 'injurious' to an extremely broad and ill-defined area. On the basis of an affidavit sworn, the document or its contents *shall* be refused examination.

The result of such unequivocal language in a law designed to ensure the 'proper administration of justice' has provoked strong criticism. The proponents of change in Canadian secrecy laws have concentrated much of their efforts for reform in this area, seeking ways in which the role of the judiciary might be expanded in order to ameliorate the apparent scope for arbitrary action on the part of ministers.

MOVEMENT FOR REFORM

Concern for and attempts to reform the practice of government secrecy in Canada is of fairly recent origin. In 1962 the Glassco Commission[27] pointed out some of the propaganda roles adopted by government departments. In contrast to practice in the United States, classification categories for documents were not clearly specified in Canada, nor was there provision for automatic declassification although a 30-50 year rule inherited from the British was employed by the official Canadian government archivist. This practice was ameliorated in 1965 with the circulation of a Treasury Board directive which specified 35 years as the time a document might be withheld without the permission of the Dominion archivist.[28] There was, however, a feeling that this directive might lead to a specification of 35 years as the minimum period for withholding, rather than a maximum.[29]

[26]*Federal Court Act*, R.S.C., s 41.
[27]Canada, Royal Commission on Government Organization, *Report* (1962)
[28]Management Improvement Circular, T.B. 636933 (March 30, 1965) Quoted in Rowat, *op. cit.*, p. 494.
[29]See Rowat, *op. cit*, pp. 494-495.

Also in 1965, a private member's Bill was introduced in the House of Commons[30] which attempted to legislate for the production of documents. Doomed to failure because of procedural rules in the House, it nevertheless was a harbinger of change. Professor Rowat's comparison of Canadian and Swedish secrecy laws also appeared in 1965[31] and in 1969 Mr. Ged Baldwin introduced another private member's Bill on the right to government information.[32]

By 1969 the government was moved to examine the area of administrative secrecy and security. It produced two reports that year which dealt with 'leakage' of documents and the general area of rights to freedom of information.[33] Although these reports tended to concentrate on the need for secrecy to preserve state security, there was the beginning, in *To Know and Be Known*, of a more liberal approach to the needs of the public for information. The result was the creation of an official government information agency—Information Canada—which was criticised as a propaganda organ of the government and subsequently disbanded.

By 1970 the pressure for specification of the rules by which information was to be released was recognised in the Federal Court Act.[34] In 1973 a cabinet directive was issued which more specifically noted what documents could be provided and what the exceptions were to the rule.[35] In 1974 Mr. Baldwin's perennial private member's Bill was referred to the House Committee on Regulations and in 1976 parliament adopted in principle the concept of freedom of information [36] This at last cleared the way for implementation of a Freedom of Information Act and was supported by the Canadian Bar Association at their annual meeting that year.[37]

Perhaps in the spirit of the enactment of the US freedom of information legislation and the developments in Australia (1976), Canada by 1977 appeared to be well on its way to developing a comprehensive policy towards information and to be incorporating the arguments for such a policy in its political culture. The Province of Nova Scotia enacted legislation on access

[30]Rowat, *op. cit*, p. 491, Bill C-39, first reading, April 8, 1965.

[31]*Ibid.*

[32]Bill C-225, "An Act Respecting the Right of the Public to Information Concerning the Public Business".

[33]*Report of the Royal Commission on Security*, Ottawa, Queen's Printer, 1969, and "To Know and to be Known", *Report of the Task Force on Government Information*, Ottawa, Queen's Printer, 1969.

[34]cf. Federal Court Act, *op cit.*

[35]See footnote 12. Also known as Cabinet Directive # 45, it is appended to Kenneth Kernaghan, *Freedom of Information and Ministerial Responsibility*, Ontario Commission on Freedom of Information and Individual Privacy, Toronto, 1978, and to The Honorable John Roberts, *Legislation on Public Access to Government Documents*, Secretary of State, June 1977, CP 32-27/1977, the "Green Paper".

[36]*Parl. Deb.*, H C, 30th Parl., 2nd Sess, Feb. 1, 1976.

[37]58th Annual Meeting, Winnipeg, September 2, 1976.

to information in 1977, the preamble of which includes the following principles:

> First . . . the rationale for enhanced public access to information is that the people be protected against government; second, more access to information is consistent with the operations of responsible government; third, the limits of public access to information are set by the demands of privacy and the expeditious conduct of government business.[38]

In the same year the Province of Ontario created a commission on freedom of information and individual privacy which has to date published nine out of seventeen research studies to:

> study and report to the Attorney General of Ontario on ways and means to improve the public information policies and relevant legislation and procedures of the Government of Ontario, and to examine:
> 1. Public information practices of other jurisdictions in order to consider possible changes which are compatible with the parliamentary traditions of the Government of Ontario and complementary to the mechanisms that presently exist for the protection of the rights of individuals;
> 2. The individual's right of access and appeal in relation to the use of Government information;
> 3. The categories of Government information which should be treated as confidential in order to protect the public interest;
> 4. The effectiveness of present procedures for the dissemination of Government information to the public;
> 5. The protection of individual privacy and the right of recourse in regard to the use of Government records.[39]

In 1978 the Province of New Brunswick also enacted freedom of information legislation in its jurisdiction.[40]

The federal government in 1977 enacted the Canadian Human Rights Act[41] which allows individuals the rights of access to personal information held on them by specified government departments. The government also issued a discussion paper or Green Paper on the legislative aspects of freedom of information[42] which has been the object of much debate.[43] Discussion has

[38]Smiley, *op. cit.*, p. 41.

[39]*Ibid*, p ii. Titles and costs may be obtained from the Commission, 180 Dundas St. W., Toronto, M5G 1Z8.

[40]New Brunswick, *Statutes*, 1978, "Right to Information Act".

[41]Canada, *Statutes*, 1976-77, c. 33 "Canadian Human Rights Act"

[42]See footnote 35, above.

[43]*Fifth Report of the Standing Joint Committee on Regulations and Other Statutory Instruments*, Votes and Proceedings of the House of Commons, June 28, 1979, pp. 916-21. See also, Rankin, *op. cit.*

proceeded apace and in March 1979 the Canadian Bar Association submitted a model Bill for freedom of information[44] and the Law Reform Commission has produced a study paper on 'Access to Information—Independent Administrative Agencies [45]

Discussion is presently concentrated in the area of the means by which exemptions to complete freedom of information might best be accomplished. The Green Paper suggests five options for review of exemptions:

1. Parliamentary notice of motion for production.
2. An information auditor who does not deal with specific cases but presents an annual report to parliament.
3. An information commissioner who could examine documents *in camera* and advise the minister.
4. An information commissioner who could order the release of documents.
5. Judicial review with power of release.

Option 1 is currently the practice but puts the onus for information requests on the House of Commons, where time and government intransigence works against disclosure Option 2 is essentially toothless as is option 3. Options 4 and 5, although discussed in the Green Paper are not obviously favoured by the authors. It is this latter area, however, that most critiques and proposals for change have developed. One proposal is for a tribunal made up of individuals from a variety of backgrounds who would have the power to order release of documents.[46] The proposal most strongly argued is that of judicial review coupled with an information commissioner. This proposal is put forward in the Freedom of Information Model Bill by the Canadian Bar Association.[47] It combines the principle of 'freedom of information unless exempted' with an information commissioner who could examine documents *in camera*.[48] His recommendations could be affirmed, varied, or set aside by the agency concerned[49] but this decision, along with the original recommendation of the commissioner could be appealed to a judge or judges of the trial division.[50] This approach has been argued against in the 'green paper' on the ground that judges could not be made properly aware of political considerations. This is countered by a legal profession who see the judiciary as being free from partisan politics.

[44]cf. Canadian Bar Association, *op. cit.*
[45]cf. R.T. Franson, *op. cit.*
[46]P.G Thomas, "Book Review" of Rankin and Roberts, *Canadian Public Administration*, Vol. 21, # 1, Spring 1978, pp. 293-94.
[47]cf. Canadian Bar Association, *op. cit.*
[48]*Ibid.*, 13(2), p. 37.
[49]*Ibid*, 14(2), p. 37.
[50]*Ibid*, 16(1-4), p. 38.

THE FUTURE

There are therefore apparent movements toward less government secrecy in Canada. However, there is still considerable resistance on the part of senior administrators to freedom of information A change of government in 1979 was prefaced by a campaign promise for freedom of information legislation and there was some expectation that it would be brought up in the current year. This expectation was enhanced by the adherence of the current ruling party to the principles of freedom of information while in opposition. A cornerstone of the stance was the presence of Mr Ged Baldwin [51] Since the election, however, responsibility for freedom of information legislation has been placed in less insistent hands There is still some expectation that notice of legislation will be included in the Speech From The Throne in October 1979[52] but there is a growing suspicion that as in revolutions, those who advocate change find themselves with different postures and priorities once in power In August of 1979 Mr Baldwin is reported to have said: "Frankly, if I was a citizen, I wouldn't believe a damn thing the government says "[53] He went on to describe an 'implacably hostile' bureaucracy and said. "These people at the top of the bureaucracy are not anxious to see a bill that would work "[54]

On September 14, 1979, Mr Baldwin again met the press and declared his intention of voting against his own governing minority party if "watered down freedom of information legislation" were introduced [55] These acts are indications that freedom of information legislation may still be some distance in the future. There is, however, a strong continuing debate in Canada on the relative merits of freedom of information, and faltering steps towards the implementation of what has been described as being "essential to the full development of democracy."[56]

☐

[51]Mr Baldwin has been appointed Chairman of the International Freedom of Information Commission (CAUT *Bulletin*, September 1979) An annual Newsletter is available from the Commission at Room 411, 76 Shoe Lane, London, EC4, England

[52]*Maclean's*, September 10, 1979

[53]*The Citizen*, Ottawa, August 25, 1979

[54]*Ibid*

[55]*CBC News*, 14 September, 1979

[56]Rowat, *op cit*, p 491

The Problem of Secrecy in Canadian Public Administration: Some Perspectives*

P.K. Kuruvilla

THE PROBLEM of secrecy in public administration has been a controversial one for a long time in a number of countries including Canada. This controversy, however, has gained unprecedented momentum in Canada particularly since 1974 when the United States Congress passed a number of significant amendments to and widened the scope of the Freedom of Information Act which was enacted there in 1966 More recently, a few steps were taken towards enacting a Freedom of Information Act in Canada. On close observation, however, it becomes clear that Canada still has a long way to go before it will take full cognisance of the importance of public access to government information and enact a meaningful Freedom of Information Act. The purpose of this article is primarily fourfold: first, to highlight the importance of openness of information in public administration; second, to list a few of the most blatant instances of denial of information that have come to light in recent years, in order to illustrate the great degree of administrative secrecy that prevails in Canada, third, to discuss some of the major impediments that stand in the way of individuals who seek access to information at the disposal of the government and to evaluate the traditionally heard governmental arguments in defence of such denial of information, and fourth, to assess the various steps the government has taken so far in its purported quest to make more information available to the public and to advance a few reform proposals which could go a long way to lift the thick veil of secrecy that currently envelops the operations of the government at almost all levels

In public administration, few issues are more crucial, or more difficult to resolve than the question of public access to information at the disposal of the government. The importance of information in public administration may be emphasised in many ways First, in a broad political sense, an informed public is an important prerequisite for a liberal democratic form of government and a paucity of information will predictably preclude the public from

* The author is grateful to Dr. John McMenemy, a colleague, for his helpful comments on an earlier version of this paper.

making properly informed choices whenever it has to exercise its franchise and to select its government. Second, devoid of adequate disclosure and dissemination of information about the operations and activities of the government, the public will not be able to discharge its democratic right to hold its administrators accountable for their actions on a day-to-day basis as well. Third, effective and imaginative public policy formulation and implementation presupposes a wide-ranging and full-fledged consideration of all policy options and opinions presented by the widest array of knowledgeable people both from the public service and outside To facilitate this to the fullest extent, it is imperative that information concerning all aspects of public policies that are being dealt with by policy makers as well as executors must be made available for public perusal and scrutiny [1] Finally, governments have become perhaps the most important institutional repositories of information concerning many facets of the lives of their peoples and their diverse socio-economic, administrative and political problems and thus undoubtedly one of the best sources of reliable data and knowledge for researchers and others who require such information for educational and related purposes [2] In this context, it must also be stressed that since the so-called government documents are, strictly speaking, public documents, paid for by public taxes and are intended to promote public interest, the public has an inalienable democratic right to have access to them [3] Without belabouring the importance of public access to government information any further, it must be added that while many people might believe that the government documents that are generally hidden away from them contain little or no information that is of immediate concern to the average people, the truth of the matter is the contrary

GOVERNMENTAL ABUSE OF SECRECY

What is at stake with regard to openness of government information is not at all any narrow legal or abstruse academic issue What is at stake is indeed the reality of political and administrative power for those who possess information and the ever-present and enormous potential for its

[1]See, Murray Rankin, *Freedom of Information in Canada Will the Doors Stay Shut?* (A Research Study prepared for the Canadian Bar Association, August 1977), p 155, Lloyd Francis, "Freedom of Information A Personal View", *Canadian Political Science Bulletin*, October 1978, Vol VIII, No 1, p 62, Joe Clark, "Democracy in Danger When Public in the Dark" (Excerpts from a speech at the opening of a special House of Commons Debate on public access to government files, June 22, 1978), *Toronto Globe and Mail*, June 26, 1978, p 7

[2]The Secretary of State, '*Legislation on Public Access to Government Documents*" (The Green Paper) June 1977, p. 3

[3]*Ibid*, also see, Joe Clark, *op cit*, p. 7

abuse by them.[4] For the purpose of underscoring this point, we may, in passing, recount here a few cases which may be somewhat representative of the many instances of governmental abuse of secrecy that have come to light in recent years and which invariably involved matters of considerable importance to not only average citizens, but even to members of parliament, royal commissions, etc. In some of these cases, the government simply refused to release information to the public or to members of parliament or even to royal commissions In some others, the courts conducted secret trials under the Official Secrets Act, or the ministers proceeded against persons suspected of commiting certain crimes without giving them an opportunity to be informed of the charges against them, or the government even broke a law and then tried to cover it up by banning the disclosure of any documents or details pertaining to it In all of these cases, as long as the government did not want to disclose information at its disposal, it had almost untrammelled power to protect its own interests and those who were adversely affected by it had virtually no effective means to defend their interests

The first incident to be mentioned here occurred about two years ago and involved the residents of the town of Port Hope who became concerned about the potential hazard from radiation poisoning which came from a refinery of Eldorado Nuclear, a crown corporation. The government conducted a series of studies on the situation and then told the residents that there was no need for concern as everything was fine, but repeatedly refused to release any reports of a factual nature regarding them on the ground that those reports contained classified information.[5]

The second incident took place in May 1975 and involved a member of parliament (Don Mazankowski, Conservative). He was refused a copy of an Air Canada contract with Canadian National (both crown corporations) on the ground that it was a confidential document. The MP subsequently found the same document on public file at the national archives! The embarrassed government then agreed to table the document in parliament.[6]

The third case involved a royal commission. In July 1977, the government established a royal commission (the McDonald Commission) with authority under the Public Inquiries Act to investigate allegations about illegal activities by the Royal Canadian Mounted Police (RCMP). At that time, the House of Commons was told by the minister responsible for the RCMP that it was essential "for the good administration of the RCMP that a full inquiry be made into allegations of unlawful actions" and the commission would "get

[4]Geoffrey Stevens, "A Problem of Attitude", *The Globe and Mail*, July 7, 1976, ed p; Joe Clark, *op. cit*, p. 7

[5]Joe Clark, *op. cit.*

[6]Hugh Winsor, "Trying to Pierce Ottawa's Screen of Confidentiality", *The Globe and Mail*, November 22, 1976, p. 1; See, G.W. Baldwin, "History of Freedom of Information in the House of Commons", *Canadian Political Science Bulletin*, October 1978, Vol. VIII, No 1 p 57.

to the bottom of the matter". The order-in-council which established this commission also stated categorically that the inquiry will be held in camera only "where the commissioners deem it desirable in the public interest.. " Nevertheless, on October 5, 1977, the lawyers representing the government appeared before the royal commission and maintained that ".. confidential government papers are privileged in the sense that whether or not they be relevant to the resolution of an issue, because of consideration of public policy, these documents will not be produced to make these confidential government papers public would be a departure from solidly established principles which are consonent with and indeed they are entrenched in our constitutional tradition " The lawyers also argued that a broad class of documents, known as 'government papers' is protected from disclosure by cabinet privilege They added, the government, not the royal commission, will determine when the public interest would be served by the disclosure of government papers[7]

The fourth was a case in which an individual was tried and convicted after a secret trial under the Official Secrets Act of Canada. On May 4, 1978, Mr Treu, a former Northern Electric engineer, was convicted of twice violating Section 4 of the Official Secrets Act for "having unlawfully retained information and documents" and having "failed to take reasonable care of the documents concerned, or conducted himself in such a manner as to endanger their safety" and sentence to two years of imprisonment. His trial was held entirely in secret in Quebec sessions court Mr. Treu was given top secret clearance in the 1960s to work on classified defence projects, when his company, Northern Electric, was given a contract to develop a system linking NATO ground and air systems in Europe After he left the company to set up his own consulting firm, he was not told that his clearance was revoked until 1974 when the RCMP raided his home and seized documents related to NATO and Canadian defence work. To add insult to injury, after being tried and convicted at a secret trial, Mr. Treu was forbidden to discuss his case, apparently as a condition for his bail. In February 1979, the Quebec court of appeals, however, threw out the lower court's ruling and set Mr Treu free.[8]

The fifth example here refers to the exceptional powers a minister of the crown has to proceed against persons suspected of certain crimes, without

[7]See, Excerpts of their arguments from the commission's transcript, published in *The Globe and Mail*, October 16, 1977, p 7; 'The Public's Business', editorial, *The Globe and Mail*, (Toronto), October 16, 1977; Jeff Sallot, 'Secrets. In a sudden about-face Ottawa has clamped down on what can be made public to the Mountie Commission—just when cabinet members were to be questioned', *The Globe and Mail*, October 10, 1978, p 7, William Monopoli, 'Can the Judiciary Stand Up for Our Right to Know?', *The Financial Post*, November 18, 1978, p. 7

[8]See, 'Is Secrecy Just? That is a Secret' editorial, *The Globe and Mail*, March 17, 1978; 'Justice Must be Seen', editorial, *The Globe and Mail*, June 1, 1978, 'Beyond Peter Treu', editorial, *The Globe and Mail*, March 8, 1979.

giving them an opportunity to defend themselves. On March 15, 1979, in an interview that was prominently reported in newspapers, the Minister of Immigration acknowledged that he had invoked a few times some of the exceptional powers that were granted to him under a new law that came into being in Spring 1978 Under this law, the government can decide in secret whether a visitor, refugee or immigrant is a threat to national security and deport such suspects with no right to defend themselves [9]

The sixth and final case to be mentioned here refers to an incident in which the government went to an incredible length including even taking a few legally questionable steps to forestall the release of official information first within a foreign jurisdiction and then domestically. In 1972, the government secretly participated in setting up what was in effect an illegal cartel to support uranium prices with the corporation of the companies dealing in uranium These companies were given the assurance that they would never be prosecuted under Canadian law for their role in the cartel And then in the summer of 1976, when details of this cartel arrangement began to emerge in the US in the course of congressional committee hearings, in an apparent attempt to prevent the US courts from subpoening the information in Canada, the Canadian Government hurriedly passed an order-in-council approving a regulation issued by the Atomic Energy Control Board of Canada making it illegal for anyone (including the MP) to disclose or communicate the contents of any written material relating to "conversations, discussions or meetings that took place between January 1, 1972 and December 31, 1975, in respect of production of uranium " Anyone contravening the regulation was liable to a fine of up to $10,000 and five years in jail. The Canadian Government had earlier protested against publication of documents from the US committee In the autumn of 1977, a group of opposition MPs, including the leader of the opposition, took the matter to the court asking it to declare the regulation invalid as a violation of the right to freedom of speech The court, however, refused to make such a declaration. The situation improved after the government passed a revised order-in-council in the winter of 1977, which made it legal to discuss information that has been made public about the government's role in setting up the cartel, but it is still illegal for uranium producers or government officials to make any more information public [10] These are just a few recent examples of withholding of valuable information by the government. Nevertheless, they show conclusively that

[9]See, "Deportation Without Defence Permitted Secret Studies of Immigrants Defended", *Kitchener-Waterloo Record*, March 15, 1979, p. 55.

[10]John King, "Canada Gave Uranium Cartel Firms Protection Against Anti-Combine Law", *The Globe and Mail*, September 30, 1977, p 1, "Cover-up, Phase Two", Editorial, *The Globe and Mail*, October 5, 1977, John King, "Cartel Rule Eased; Now One Can Talk of Ottawa's Role", *The Globe and Mail*, October 15, 1977, p 11; "A Blow to Free Speech", Editorial, "Early Chance to Profit on 'Secret' Uranium Cartel, Court Told", *The Globe and Mail*, November 12, 1977, p 1

information is being withheld at will on a grand scale and the government only discloses what it decides is in its best interests

CLASSIFIED DOCUMENTS

At present, there are two broad levels of 'classified' or 'secret' government information in Canada First, each department or agency has its own individual classified information or 'secrets' The second level of secrecy involves cabinet 'secrets'. These 'secrets' are further divided into four categories of classified information, *viz*, restricted, confidential, secret and top secret [11] The government does not seem to have an up-to-date estimate as to how many people in the public service have the authority to stamp one of these classification on a document An MP who has been a leading advocate for openness of government information, has estimated that as much as 80 per cent of government documents in Canada is stamped 'secret' [12] Whether this estimate is accurate or not, the long-established tradition in Canada has undoubtedly been that all administrative activities and documents are secret unless and until the government decides to disclose them

Consequent to this tradition of excessive secrecy and the absence of a genuine Freedom of Information Act, those who seek access to government information have always been faced with a plethora of practically insurmountable procedural as well as substantive problems Procedurally, unlike in the US, Canada has no first amendment ensuring constitutional freedom of press and therefore a constitutional right of the public to know To complicate matters, when information is denied, the government is not obliged to furnish a reason for the denial Furthermore, although the courts in Canada have traditionally been vested with the authority to issue certain 'writs' or orders directed toward administrative officials, those who are refused information cannot conceivably receive much relief from the courts The prerogative writ of mandamus which is an order that an official carry out certain mandatory duties (ministerial) vested in him by law will not generally be issued against the crown or any agent of the crown acting in his official capacity Before such a writ is issued, it will have to be demonstrated to the satisfaction of the court that the official in question has a statutory duty to produce the document in dispute But as it is, such requisite statutory duty is lacking because most statutes either do not stipulate disclosure or explicitly stipulate non-disclosure In addition, there is also the difficult requirement of 'standing' which demands that the plaintiff must show a 'special interest' in the subject matter of the suit over and above that of the general public Even if those seeking access to government information can somehow

[11]*The Report* of the Royal Commission on Security (Abridged), June, 1969, pp 69-70

[12]See, the statement of G W Baldwin in "Halifax Meet Public Secrecy is Challenged", *Kitchener-Waterloo Record*, September 7, 1976, p 63

surmount these procedural obstacles, they will still be saddled with a number of serious substantive difficulties For example, there is always the possibility for the government to invoke its 'crown's privilege' to declare certain documents secret and to keep them beyond the domain of judicial scrutiny.[13]

It is true that over the years, this privilege has suffered a certain amount of erosion as a result of judicial interpretation and statutory legislation such as the Federal Court Act of 1970. Sub-section 41(1) of the Federal Court Act imposes some limitation on the powers of the federal cabinet ministers to withhold documents from the public It provides that a minister may certify to a court that a document should be withheld in the public interest, but the court, after examining the document, decides whether this claim is justified, or whether the 'public interest' in the proper administration of justice outweighs the importance of the public interest specified in the 'minister's affidavit' opposing the document's production However, under sub-section 41(2) the minister is still left with a dangerously vast amount of power to withhold documents from production in any court merely by certifying that it is necessary to do so It provides that:

> When a Minister of the Crown certified to any court by affidavit that the production or discovery of a document or its contents would be injurious to international relations, national defence or security, or to federal-provincial relations, or that it would disclose a confidence of the Queen's Privy Council of Canada, discovery and production shall be refused without any examination of the document by the Court.

So also, when faced with the problem of ministerial refusal to release vital information and the exclusion of such refusals from the purview of judicial scrutiny, if the litigants decide to seek solace from extra-ministerial and judicial sources such as the public service or parliament, they will still be menaced by a multitude of rules and regulations, many of which are arcane relics of a bygone era.

CIVIL SERVANTS' OATH

As far as public servants are concerned, there is a number of important legal as well as administrative sanctions that serve as deterrents against any unauthorised or wrongful disclosure of information. The most important sanction against anyone who seeks to breach the walls of secrecy seems to be the Official Secrets Act of 1939, which is based on a 1911 British Act which

[13]Murray Rankin, "Access to Information Vital to Researchers", *C A U T Bulletin*, January, 1978, p 6; *Freedom of Information in Canada Will the Doors Stay Shut?* pp 7-12, Geoffrey Stevens, "A Multiquetoast Brief", *The Globe and Mail*, May 31, 1978, ed p ; "Judicial Review", *ibid*, July 25, 1978, Ed p ; "Dangerous Crown Privilege", Editorial, *Ibid*, September 30, 1974.

forbids the disclosure of literally everything about the government without official approval. The Official Secrets Act of Canada which was originally designed to combat espionage activity in the country at a time when World War II was gathering momentum in Europe also provides sweeping powers to the government to prosecute anyone for releasing without permission any information that is considered confidential. Section 4(1) of the Act provides.

> Every person is guilty of an offence who having in his possession or control any secret official code word, or pass word, or any sketch, plan, model, article, note, document or information that has been entrusted in confidence to him by any person holding office under Her Majesty . communicates the code word, pass word, sketch, plan, model, article, note, document or information to any person, other than a person to whom he is authorized to communicate .

The Act also makes it an offence for any person to receive information, knowing or having reasonable ground to believe that it is illegally obtained [14] As Canada's most influential national newspaper put it editorially recently:

> Once invoked, the Official Secrets Act can be exercised in perfect darkness with no provision for the public scrutiny of its investigative instruments, no forum for the public examination of its objectives, no assurance of a public trial—nothing A man may be pursued, charged, tried, convicted, sentenced (to a maximum of 14 years' imprisonment) and eventually released, with barely a single public syllable uttered And it doesn't stop there A victim of the Official Secrets Act may be ordered never to discuss any matter relating to his case—on pain of prosecution—because to do so would be to breach an official secret.[15]

Besides the provisions of the Official Secrets Act, the various provisions of the criminal code governing offences such as breach of public trust, theft, and even treason can also be adroitly invoked to deal with public servants who engage in wrongful or unauthorised disclosure of information. Another, legally less severe, but nevertheless administratively potent, sanction against unauthorised discharge of information by public servants can be seen in the oath of secrecy that every public servant has to take at the time of assuming office, in which he affirms that·

> . I will not, without due authority disclose or make known any matter that comes to my knowledge by reason of such employment [16]

[14]Official Secrets Act, *Revised Statutes of Canada*, 1979, c 0-3, s. 4(3).
[15]See, "Beyond Peter Treu", Editorial, *The Globe and Mail*, March 8, 1979.
[16]The Public Service Employment Act, R S C , 1970, C-P-32, Schedule III. Also see, Rankin, *op cit* , p 30.

If the litigants seek to enlist the support of their members of parliament, as an alternative to the public service route, then also the odds seem to be heavily against them. Theoretically, ever since the government tabled in parliament in March 1973, the 'guidelines for notice of motion for the production of papers',[17] it is committed to make government papers, documents, and consultant reports available to the MPs when they file a notice of motion requesting them, provided they do not fall within certain categories of exemption. But, in practice, there are a number of factors that make this alternative almost totally worthless to the litigants. This is so because, first, they have to persuade the MPs to take up their case and file the necessary motion before parliament on their behalf[18] Second, there are a few difficulties that stare the parliamentarians themselves in the face in this regard One such difficulty is that these guidelines include sixteen broad exemptions[19] under which the government can conveniently reject requests from MPs for information whenever it deems desirable to do so Another difficulty is that, given the nature of the parliamentary system, it is unrealistic to expect parliament to act as a viable institution to process requests for information on a routine basis It is well known that ordinary parliamentarians have little power or influence and the cabinet makes the real decisions. The standing orders of the House of Commons provide that when an MP is not satisfied with the government's explanation for refusing to release a document, the matter may be debated for a maximum of one hour and fifty minutes and then voted upon But in practice it is too much to expect that parliament will actually be able to devote so much time for such debates. So also, since the very continuance of the government would depend upon the outcome of such votes, as long as the government commands a majority in the house, it is very unlikely that documents would be made available against the will of the government as a result of such debates and vote taking.[20]

Traditionally, there have been two principal arguments coming from governmental sources in support of their obsession with secrecy and opposition to any kind of meaningful freedom of information law First, it has been a long-standing familiar argument that public access to government documents will be detrimental to public policy-making process because it

[17]Guidelines for the Production of Papers in Parliament, *Parl Deb H.C.*, Vol. 2, 1973 at 2288.

[18]Rankin, *op cit.*, p 38.

[19]These include· legal advice given to the government, information that would be detrimental to the security of the state, papers which "might be detrimental" to the future conduct of foreign relations or federal-provincial relations, papers which "could allow or result" in financial gain or loss by a person or persons; papers reflecting on the competence or character of an individual, "papers of a voluminous character or which would require an inordinate cost or length of time to prepare"; papers which would embarrass the Royal Family or its representatives, papers relating to negotiations leading to a contract; Cabinet documents; papers of a private or confidential nature.

[20]Rankin, *op. cit.*, p 40.

might inhibit free discussion of alternative policy options by public servants and ministers and make it extremely difficult for senior public servants to safeguard their political neutrality and anonymity and to serve successive governments of different political parties More recently, the Green Paper on government documents published by the government reiterated this argument in no uncertain terms when it asserted that

> Individual public servants who signed reports, memoranda, or letters subsequently released to the public might become the subject of public comment, and under our convention of the anonymity of the public service, they would be unable to respond. As well, advice contained in such documents might be construed in the press and Parliament as embarrassing to a minister or be used to try to break down the unity of the governing party, even though such advice did not represent government policy or a course of action acceptable to the minister Furthermore, senior officials frequently find themselves providing advice to ministers within a tight framework of politically acceptable solutions or existing government policy. Exposure to such recommendations might cripple the ability of ministers of a new government of a different party to enter into relations of full mutual confidence with public servants Yet the features of political neutrality, promotion on merit, and anonymity of public servants help provide for cohesive administration through the many transitions of government which can occur in a parliamentary system For these reasons, the candor and comprehensiveness of recorded dialogue within government might be eroded by systematic public access [21]

The Royal Commission on Security echoed the same sentiment in its report when it wrote.

> We would view suggestions for increased publicity with some alarm We think the knowledge that memoranda might be made public would have a seriously inhibiting effect on the transaction of public business. We believe that the process of policy-making implies a need for wide-ranging and tentative consideration of options, many of which it would be silly or undesirable to expose to the public gaze. To insist that all such communications must be made public would appear to us likely to impede the discussive deliberation that is necessary for wise administration [22]

A second argument opposing public access to government documents is predicated on the premise that the introduction of public access would

[21] Secretary of State, *Legislation of Public Access to Government Documents*, 1977, p 4

[22] The Royal Commission on Security Report (Abridged), Ottawa, Queens Printer, 1969, Section 223, p. 80

necessarily have to be coupled with the establishment of a list of exemptions as well as an effective mechanism for dealing with disputes as to whether particular documents should or should not be made public. According to this argument, any such arrangement independent of the ministry would naturally lead to an erosion of ministerial responsibility which entails the answerability of ministers to parliament for the actions taken by them or by public servants responsible to them. This argument also received a reiteration in the Green Paper when it said:

> Legislation on public access to government documents would require continual decision on the applicability of exemption to material requested in applications for access. This would have important implications for the exercise of ministerial responsibility. To the extent that Ministers would be required to decide on requests, the exercise of ministerial responsibility would be sharpened. If such decisions, taken by a Minister or in his name, were subject to a mandatory reversal by some review mechanism, with power to require the release of documents, the exercise of ministerial responsibility could be eroded. For example, a minister could not be criticized for the contents of government documents which represent no more than the analysis or recommendations of individual officials or consultants and are not government or departmental policy. Though presumably the Minister may be questioned to ascertain the status of such documents, he cannot be considered *ipso facto* responsible for them in the same sense in which he is held to be responsible for, say, the administrative actions taken in his department. Of greater importance, mandatory ordering of the production of documents, in effect substitutes the judgement of an appointed official—a parliamentary commissioner or a judge—for that of a Minister, with regard to the need for confidentiality in areas such as national security, or international or federal-provincial relations. The consequences of misjudgement in this regard will, however, be visited upon ministers, and upon the public interest which they are elected to interpret in policies and programmes. This is the essence of ministerial responsibility Ministers are accountable for their decisions—to Parliament and to the public Public servants are accountable in the first instance to Ministers.[23]

[23] The Secretary of State, *op cit.*, pp. 4-5. Also see, Gordon Robertson (Clerk of the Privy Council and Secretary to the Cabinet), "The Growing Leak of Secret Documents", *The Globe and Mail*, September 7, 1972, p. 7, "Courts Should not be the Arbiter", *The Financial Post*, December 17, 1977, p. 7, Anthony Whittingham, "Right to Know is Not Yet a Right", *The Financial Post*, September 18, 1976, ed p., Hugh Winsor, "Anti Secrecy Moves Upset Tradition", *The Globe and Mail*, November 24, 1976, p. 8.

STEPS TOWARDS MORE FREEDOM OF INFORMATION

Using these and a few other similar arguments, successive governments have, so far, successfully denied any significant degree of public access to their ever-expanding arsenals of secrecy However paradoxical it may seem, they have also been taking a few tepid steps in the direction of enacting a Freedom of Information Act, especially during the last decade. In 1969, an authoritative government spokesman publicly acknowledged the persistent pleas of advocates of freedom of information in the country and promised government support for the adoption of a Freedom of Information Act for the first time[24] There were, however, hardly any visible developments in that direction for the next four years or so until in March 1973, when the government announced a set of guidelines covering release of information by cabinet ministers in response to MPs' questions Although the stated purpose of these guidelines was to assist the MPs to obtain information contained in government documents, as has been pointed out earlier, these guidelines included sixteen broad exemptions which 'almost swallowed the rule' and which ministers could easily use in refusing to release documents requested by MPs In the autumn of 1973, the government also asked Mr. D F. Wall, who was then assistant secretary of the cabinet for security matters, to undertake a study on the existing means of providing information to parliament and to the public and to make recommendations for improvements

This study was submitted to the Prime Minister in 1974, but the government, in its characteristic fashion, decided to keep it secret until an expurgated edition of it was made public before the Standing Committee of the House of Commons—the Senate Joint Committee on Regulations and other Statutory Instruments in 1975 Mr. Wall's report generally subscribed to the traditional view that most of the policy development processes should be shrouded in secrecy in order to promote candour on the part of public servants and to preserve the conventions of civil service neutrality and anonymity, but still contained a few strong criticisms of the government's information policies These included: poorly prepared information handouts; inadequate explanations of the content and rationale of policies, a pervasive tendency on the part of public servants to remain aloof from and unavailable to journalists and MPs; an outdated Official Secrets Act; an unduly restrictive oath of office and secrecy, and a well-entrenched and long-standing tradition of over-classification of information[25] Mr Wall also urged the adoption of an improved

[24]It was Mr John Turner, then Minister of Justice, who called for the introduction of a Freedom of Information law. The two key features of the legislation he proposed were: first, 'a very narrow list of exceptions' under which the government could withhold information, and, two, judicial review of ministerial refusals to make information public

[25]For these and a few other related points, see, Paul G Thomas, "Secrecy and Publicity in Canadian Government", *Canadian Public Administration*, Spring 1976, Vol 19, No. 1, p 159.

information policy on the basis of the government's guidelines of March 1973, but with only eight exemptions instead of sixteen.[26]

The next step came in February 1976, when an all-party committee on freedom of information of members of the House of Commons released a paper in which it unanimously recommended four things, *viz.*,

1. Freedom of information legislation be enacted in the then session of parliament;
2. The act provides for judicial review by a panel of federal court judges;
3. The exemptions for releasing documents be specifically and narrowly drafted; and,
4. Freedom of information Bills presented by the government be subject to a free vote [27]

In June, 1977, three years after Mr. Wall completed his study, and sixteen months after the House of Commons Committee made its recommendations, the government published a Green Paper on legislation on public access to government documents with a great deal of fanfare and publicity. The Green Paper began with ringing phrases about open government as the 'basis of democracy' and an 'essential consequence of the extension of the franchise to all adult citizens' It also acknowledged unequivocally at the outset that citizens are entitled to more information about the way they are governed and even asserted that the government believes firmly in the basic principle that information developed at public expense ought to be publicly available whenever possible However, thereafter it went to considerable length to highlight the difficulty in balancing these rights against effective government and to vindicate its characterisation of parliamentary government as a place of 'public decisions privately prepared' Although the Green Paper acknowledged that there are a number of areas where the government should be more open, it advocated only the type of changes that would not interfere with what it described as the 'privacy of decision-making'. So also, despite the few platitudinous statements about the principles of open government it presented at the outset, the bulk of it was devoted to exemptions to these principles and the possible options for review of complaints by applicants who have been

[26] These include information that would. endanger the security of the state, damage Canada's interests in international relations, constitute an invasion of individual privacy, damage federal-provincial relations, jeopardize a government process of financial or commercial negotiation, jeopardize the integrity of legal opinions, constitute a breach of confidence, of the law, or of the rules of Parliament, and 'jeopardize the confidence necessary to the advisory, consultative and deliberative processes of government administration' See, Paul G Thomas, *op cit*, p. 160

[27] See, Lloyd Francis, *op. cit.*, p 59.

denied access to government documents.[28]

The exemptions proposed in the Green Paper covered the following nine categories, *viz.*,

> those documents, the disclosure of which, or the release of information in which, might
>
> (*i*) be injurious to international relations, national defence or security or federal-provincial relations;
>
> (*ii*) disclose a confidence of the Queen's Privy Council for Canada:
>
> (*iii*) disclose information obtained or prepared by any government institution or part of a government institution, that is an investigative body:
>
> (*a*) in relation to national security,
>
> (*b*) in the course of investigations pertaining to the detection or suppression of crime generally, or
>
> (*c*) in the course of investigations pertaining to the administration or enforcement of any Act of Parliament,
>
> (*iv*) disclose personal information as defined in Part IV of the Canadian Human Rights Act or threaten the safety of any individual or disclose correspondence between a member of the public and a Member of Parliament or the government;
>
> (*v*) impede the functioning of, or the examination of a case or issue before, a court of law, a quasi-judicial board, commission or other tribunal, or any inquiry established under the Inquiries Act;
>
> (*vi*) disclose legal opinions or advice provided to a government institution or privileged communications between lawyer and client in a matter of government business,
>
> (*vii*) disclose financial or commercial information which:
>
> (*a*) would jeopardise the position of a government institution in relation to contractual or other negotiations or the position of any other party to such negotiations, or,
>
> (*b*) would result in significant and undue financial loss or gain by a person, group, organisation or government institution, or,
>
> (*c*) would affect adversely a person, group, organisation or government institution in regard to its competitive position;
>
> (*viii*) destroy the fullness and frankness of advice serving the decision-making process, particularly in relation to advice to or by ministers,

deputy heads, and senior officials, to preparation of legislation, or to the conduct of parliamentary business

(*ix*) be prohibited by any federal enactment.[29]

The options for review of complaints by applicants who have been denied access to government documents considered in the Green Paper were as follows.

I Parliamentary review of the administration of the legislation;

II An information auditor with powers to monitor the administration of the legislation, similar to the powers of the Auditor General in respect of financial management,

III. An information commissioner with 'ombudsman-type' powers to consider complaints from applicants, examine *in camera* the documents requested, and issue public advice to the government as to his agreement or disagreement as to the application of the exemptions to the documents in question,

IV An information commissioner with powers to consider complaints from applicants, examine *in camera* the documents requested, and issue a binding order to the government to release a document where he does not agree with the government's position as to application of the exemptions; and

V Review by the courts of the administration of the legislation [30]

As far as one can judge by reading the Green Paper, the options that were most and least favoured by the government were the third (an information commissioner with 'ombudsman-type' advisory powers) and the fifth (judicial review), respectively Although when there is a difference of opinion between such an information commissioner and the minister of a department concerned, the minister will have the final say and the former would have no more power than that of recommendation and publicity. The Green Paper claimed that.

> Such an information commissioner's formal powers, therefore would be confined to the power of publicity although a report, contrary to a ministerial decision, might be very compelling in a matter of this kind. Given an information commissioner as a creature of parliament, a reasonable sense of independence and a degree of public confidence should be expected. This option could provide consistent and speedy recourse for applicants to choose to complain, at minimal cost to them.[31]

[29] The Secretary of State, *op cit*, pp 10-11.
[30] *Ibid*, pp 16-19.
[31] *Ibid*, p 17

At the same time, it had this to say about the option of judicial review·

..this approach raises a number of fundamental questions One of the cornerstones of our system of parliamentary democracy is that Canadian courts and the judges who sit on them must not only be completely independent of the political process but must also be seen to be so The role of the judge is the impartial arbitrator; he must ensure that justice is fairly administered in the resolution of legal problems To require that he become a judge of a minister's actions, that he should have the power to replace the opinion of the minister with his own opinion, is to change his role entirely and to bring him into the political arena where he cannot properly defend himself. All of this could seriously threaten the independence of the courts and thereby place in jeopardy our present judicial system. Under our current conventions, it is the minister who must remain responsible for deciding whether to refuse or grant access to documents and this responsibility is a constitutional one owed to his cabinet colleagues, to Parliament, and ultimately to the electorate A judge cannot be asked, in our system of government, to assume the role of giving an opinion on the merits of the very question that has been decided by a Minister. There is no way that a judicial officer can be properly made aware of all the political, economic, social and security factors that may have led to the decision in issue. Nor should the courts be allowed to usurp the constitutional role that parliament plays in making a Minister answerable to it for his actions In short, the use of the elaborate apparatus of the courts would serve neither the exercise of parliamentary review of ministerial decision-making, nor the public interest in an efficient and effective judicial system, nor the interests of an applicant facing a government department with a substantial array of legal talent at its disposal.[32]

Soon after the Green Paper was released, it was referred to a standing committee of the House of Commons and the Senate on Regulations and Other Statutory Instruments for review and recommendations In June, 1978, this committee unanimously recommended a fairly tough freedom of Information law with fewer grounds for refusing information and a provision for those refused information to have a final recourse to the courts But the government did not act upon these recommendations

JUDICIAL REVIEW OF MINISTERIAL REFUSAL OF INFORMATION

The newly elected Prime Minister Joseph Clark has promised to introduce speedily a Freedom of Information Act patterned after the Freedom of

[32]The Secretary of State, *op cit*, pp 17-18.

Information Act in the US, with narrow exemptions and with judicial review of ministerial refusals to release information to the public However, without attempting to anticipate what lies ahead, it may still be pointed out here that in the opinion of this author, the two traditional but untested governmental arguments supporting secrecy of information cited above, however sincere they might be, show only one side of the case. Without ignoring the importance of the first argument, *viz.*, the candour and comprehensiveness of recorded dialogue within government might be eroded by systematic public access, it may be said that when a Bill has been brought before parliament, there is nothing inherently wrong about the civil servants who have studied the problem factually and have tendered their advice on the basis of their expertise in the matter being required to disclose the nature of their recommendations. Indeed, on the contrary. it can be argued that unless there are some very exceptionally confidential angles to it, it would be incredibly wrong not to disclose the basic factual details of the matter on the basis of which the government makes a policy decision because otherwise the outsiders cannot decide whether there was sound judgment or not behind governmental decisions.[33] Similarly, on closer scrutiny, the contention that a law making public document if made public would jeopardise the long-cherished neutrality and anonymity of public servants because they will become identified as protagonists in policy debates, also does not seem to hold much water for at least two reasons First, if at all this is a genuine danger, it can be deterred by deleting the pertinent names of the public servants involved in the documents which are revealed.[34] Second, public service neutrality and anonymity need not be regarded as ultimate ends in themselves that must be safeguarded at any cost including even sacrificing the very integrity of the governmental decision-making process.

Concerning the second argument, namely, public access to government documents coupled with a mechanism such as judicial review to resolve disputes regarding specific documents could compromise the concept of ministerial responsibility too, certain counter-arguments can be advanced. First, the concept of ministerial responsibility is only a convention or an unwritten rule that has been carried over from Britain and there is nothing permanent or sacrosanct about it that cannot be altered or even abandoned altogether, if found necessary otherwise. Second, although

[33]See, Gordon Fairweather, "Secrecy: Why the Sacred Cow Should Die and the Public Should See More", *The Globe and Mail*, September 9, 1972, p. 7; Ian Macdonald, "Cut the Secrecy that Leads to Distrust and Fear", *The Financial Post*, May 23, 1974, ed. p ; Thomas Coleman, "Act Could Give Canadians Freedom to Know Little", *The Globe and Mail*, September 9, 1976, p 9; Philip Teasdale, "A Crusade for the Right to Know", *The Financial Post*, April 16, 1977, ed p; Lloyd Francis, *op cit.*, pp 59-62; Tom Riley, "Freedom of Information—the Red Issue is Judicial Review", *C A.U.T. Bulletin*, October 1978, pp. 7-8, Rankin, *op. cit.*, pp. 134-136.

[34]Rankin, *op. cit*, p. 135; Joe Clark, *op cit.*

parliament has the constitutional ability to make the government answerable to it for its actions, in practice, it cannot hold it accountable unless it has adequate information as to what the government is doing. It may even be argued that by systematically denying information, the government has already deprived parliament of this constitutional duty and hence the concept of ministerial responsibility is now nothing but a myth.[35] Third, to assert that ministerial decisions must not be subject to a reversal by some review mechanism with power to require the release of documents, is in fact to maintain that ministers must be above law or be themselves judges in their case. Fourth, the argument that giving responsibility to the courts to review executive decisions concerning the release of documents will impinge upon the rights and responsibilities of the ministers and obscure the distinction between the political and judicial processes, also may be answered as follows.

First, besides the executive and legislative domains, parliamentary democratic tradition sanctifies the judicial domain as well. It, in fact, dictates that while legislatures enact laws and ministers administer them, courts settle disputes, including even a review of ministerial interpretations of legislative enactments, if and when it becomes necessary. Second, it must not be forgotten that judges have already been overriding the legal interpretations of the executive in a number of areas. And, third, if the issue in question is the sensitiveness of the material that is involved, the courts can very well deal with them on an in-camera basis.[36]

Finally, in conclusion, it must also be pointed out that perhaps there cannot be much disagreement over the necessity of having a few exceptions under a Freedom of Information Act, provided their sole purpose is to protect the genuine interests of the state. But it is extremely important that before such exemptions are drawn up, a distinction between the interests of the country at large, on the one hand, and the interests of the government of the day, on the other, must be struck and the government must have the right to withhold information only when it would adversely affect the former.[37] Such exemptions also must not be too broad and sweeping in scope. Otherwise, they would predictably dilute and even defeat altogether the very purpose of a Freedom of Information Act. Besides the exact nature of the review mechanism and the exemptions that must be provided for, there are a few other key issues such as what should be the extent of time to be allowed between the receipt of requests for documents and their disposition, the share of the cost of reproducing information to be borne by those who request for it, etc., which must also be resolved before an effective Freedom of Information Act can be brought about. However, as the

[35]Rankin, *op. cit.*, pp. 108-111, Joe Clark, *op. cit.*

[36]Rankin, *op. cit.* pp. 111-125; Joe Clark, *op. cit.*, II Tom Riley, *op. cit.* pp. 7 5; Geoffrey Stevens, "Judicial Review", *The Globe and Mail*, May 25, 1978 [illegible]

[37]Lloyd Francis, *op. cit.*, pp. 62-65; Tom Riley, *op. cit.*, pp. 7-[illegible]

experience in the US has shown,[38] these are not insoluble issues at all, provided there is sufficient political will and commitment on the part of the government to depart from the present situation which is dangerously open to abuse and to act decisively in favour of lifting the veil of secrecy that surrounds its activities. As matters now stand, it is difficult to avoid the conclusion that the time has come for Canada to follow the lead of the United States in passing an effective Freedom of Information Act that would provide public access to government information.

□

The Canadian Proposals on Freedom of Information

The new Progressive Conservative Government has just introduced for first reading its promised Freedom of Information Act and it has yet to receive a full debate in the legislature. The Bill goes farther than the previous government's proposals in seeking to define and to limit the range of matters on which the government will be able to withhold information. Moreover, there is still needed a privacy bill and further attention to the Official Secrets Act which is now seen to be badly out-of-date. To some extent, further developments may have to await the report of the Royal Commission on the R. C. M. Police which is particularly concerned with provisions relating to security.

[38]The U.S Freedom of Information Act (as amended in 1974) also contains nine exemptions, but by comparison they are far narrower than the exemptions proposed in the Canadian Green Paper. Also see, I. Cinman, "U.S Freedom of Information Act· Some Difficulties Amid Success", *C.A U T. Bulletin*, October 1978, p 11

The Federal Privacy Commissioner of Canada : Defender of Peoples' Privacy*

G.B. Sharma

IN PURSUANCE of the recommendations made by the Royal Commission on the Status of Women (1970), Bill C-72, entitled the Canadian Human Rights Bill, was introduced by the then Minister of Justice in July, 1975 The Bill died on the order paper of the first session of the 30th parliament, but was reintroduced as Bill C-25, in November, 1976. The Bill C-25 was passed by the parliament and received the royal assent on July 14, 1977. The Canadian Human Rights Act (hereinafter referred to as the Act), thus promulgated was divided into five parts which were enforced in two different stages The five parts of the Act are : Part I Proscribed Discrimination; part II: Canadian Human Rights Commission; part III· Discriminatory Practices, part IV: Protection of Personal Information: and part V: General Of these, part II—the Human Rights Commission, was promulgated within less than a month following the enforcement of the Act Accordingly, a Human Rights Commission was constituted with R G L. Fairweather as the chief commissioner, Rita Cardieux, the deputy commissioner, and Inger Hansen as a member Later, in February, 1978, five part-time commissioners were also appointed by an order in council so as to complete its composition [1] The first meeting of all the commissioners was held in Ottawa from February 20 to 22, 1978 However, the substantive parts of the Act—those concerning discriminatory practices, the protection of privacy of information (contained in the federal data banks), and the functioning of the commission were promulgated on March 1, 1978

In accordance with the provisions of part IV of the Act, the chief commissioner recommended to the Minister of Justice that Inger Hansen, one of the members of the Canadian Human Rights Commission, be designated as

* The author is extremely grateful to Inger Hansen, the Privacy Commissioner and her secretariat for extending their cooperation without which this perhaps could not have been completed However, the responsibility for the views expressed in the paper is entirely of the author.

[1]Canada, *Annual Report*, Canadian Human Rights Commission, Ottawa, Human Rights Commission Secretariat, 1977-78, p 7

privacy commissioner (PC). Inger Hansen assumed her office on October 1, 1977.[2] But her office could actually commence its work only from March 1, 1978, that is, the date of promulgation of part IV of the Act

In this paper we intend to critically examine the various provisions contained in part IV of the Act with special reference to how they have hindered or helped Canadian citizens and residents in the protection of their personal privacy, and gaining access to personal information. Additionally, we also intend to examine the role of the PC during the last year and a half, against the ombudsman rhetoric of 'peoples' defender'.

As far as the methodology employed by us for collecting our data is concerned, we may divide it into two parts. First, a sizeable part of it has been collected from the secondary source, namely, the documents of the PC's secretariat; second, for collecting first hand information regarding the social profile of the PC's clients, we had designed a mini-questionnaire. Owing to the dual constraints of time and financial resources we decided to pick up a small sample of one hundred cases chosen on a random basis The sample thus chosen constituted nearly 12 per cent of the total complainants to the PC. The questionnaires were mailed to our respondents directly by the PC's secretariat The respondents were also requested to return their duly filled responses to the PC's secretariat in order to assure them about the privacy of their responses. The questionnaires were mailed to respondents in the first week of July 1979, and all the responses received from them by the end of third week of August, 1979, were processed The response rate was as low as 41 per cent We, therefore, realise that no sound generalisations can possibly be made on the basis of such a small number of responses but we do believe that they are not without value As they are indicative of certain trends, we may gainfully use them for the purpose of accomplishing our limited objective of completing this paper.

Having stated our main objectives and methodology, we intend to examine certain general provisions of the Act which have a bearing upon the position of the PC.

GENERAL PROVISIONS OF THE ACT EXAMINED

As pointed out above, the Act prescribes that "The Minister of Justice, on the recommendation of the Chief Commissioner of the Canadian Human Rights Commission established by Section 21, shall designate a member of that Commission to act as Privacy Commissioner (Section 57) " Needless to add that the above provision of the Act enabling the Minister of Justice to name the PC goes very much against the concept of an ombudsmanlike

[2]*Annual Report, op cit*, p 15.

institution as a representative of legislature.[3] In our opinion, it further compromises with the principle of independence of a grievance-handling mechanism, such as the office of the PC, from the executive. We, therefore, believe that for ensuring the independence of the PC from the executive, not only in the spirit but also in the letter of law, it would be much better to amend the above section along the following lines "The Speaker of the House of Commons, on the recommendation of the Chief Commissioner of the Canadian Human Rights Commission . shall designate a full-time member of the HRC to act as Privacy Commissioner."[4] As far as the tenure is concerned, a PC shall hold office for a term not exceeding seven years, in case the incumbent happens to be a full-time member of the Commission, and not exceeding three years, in case he is drawn from amongst its part-time members The present incumbent however being a full-time member she enjoys a seven-year term [(Section 21(3)] In regard to the tenure of office of the members of the Commission, the Act further provides that "each member of the Commission holds office during good behaviour but may be removed at any time by the Governor in Council on address of the Senate and House of Commons [(Section 21(4)] However, a member of the Commission is eligible for reappointment in the same or another capacity for an unlimited number of terms [(Section 21(5)] "

The generality of the following provisions of the Act further restricts the independence of the Commission as well as the PC, and mars their impartial image in the eyes of a common man The first provision which says "Each full-time member of the Commission is entitled to be paid a salary to be fixed by the Governor in Council" virtually provides the executive with a *carte blanche* to fix the salaries of the members and vary them according to their sweet will, from time to time In this behalf therefore we wish to suggest that the above provision contained in Section 24(1) of the Act must be amended to read. "Each full-time member of the Commission is entitled to be paid salary to be fixed by the Parliament, from time to time "

According to the second provision hampering the independence of the entire Commission as well as the PC, "Such officers and employees as are necessary for the proper conduct of the work of the Commission shall be appointed in accordance with the Public Service Employment Act" [Section 26(1)] This provision in effect implies that whenever the commission needs a new post, it must approach the Treasury Board for final approval The following facts, drawn from the first report of the Commission, clearly

[3]For a discussion of the concept of ombudsman see· G B. Sharma, "The Office of the Ombudsman in Nova Scotia Province. A Conceptual-Empirical Analysis", *Indian Journal of Public Administration*, Vol. XXIV, No 4, 1978, pp 1100-1129.

[4]The addition of the word 'full-time' is very essential in our view because the present provision of the Act leaves a good deal of possibility of the appointment of a part-time member as the PC

indicate as to how the above provision helps the executive temper with the independence of the commission. The report says:

> By a decision of the Treasury Board, the Canadian Human Rights Commission has been allocated $ 3,000,000 for fiscal year 1978/79 and 106 positions represented by 84 staff years. Both the amount of money and allocation of staff years are considerably less than we requested.... Adequate classification of positions is a continuing battle and, although we are satisfied with many levels, our operative positions are classified at a lower level than we believe appropriate to their role.[5]

Another provision of the Act lays down that "The Commission may make by-laws for the conduct of its affairs . ." [Section 29(1)]. Strangely, however, the autonomy granted to the commission by the above provision is completely taken away by a subsequent provision contained in the same section. The subsequent section says: "However, no by-laws made . .shall have effect unless approved by the Treasury Board" [Section 29(2)].

Last but not the least, the following provision, perhaps, goes the longest way in tarnishing the image of the commission and the PC as the independent defenders of the peoples' information rights against the executive. The provision in question reads:

> The full-time members of the Commission are deemed to be persons employed in the Public Service for the purposes of the *Public Service Superannuation Act* and to be employed in the public service of Canada for the purposes of the Government Employees Compensation Act and any regulation made under section 7 of the Aeronautics Act (Section 30).

How can an institution, whose personnel's entire terms and conditions of employment are controlled and governed by the executive to this extent, afford to act independently of it? And even if it really does, what is the guarantee that a man in the street would believe it to be true. In regard to such grievance handling mechanisms it is not only sufficient to ensure their independence in spirit but also in the letter of the law This, unfortunately, has not been done in regard to the Canadian Human Rights Commission and the office of the PC

Having examined the foregoing provisions of the Act which have significant implications for the status and the role of the PC, we intend to examine the provisions contained in part IV of the Act which is our main concern in this paper

[5]*Annual Report, op cit*, p 8

PART IV OF THE ACT EXAMINED

Before we take up a discussion of the various important sections contained in part IV of the Act, it may be useful to make two preliminary remarks. First, part IV of the Act deals with 'federal information banks'. It places obligations on departments and agencies *that hold federal information banks* and it gives right of access and correction to individuals with regard to information held about them in those banks. A federal information bank has been defined as a store of records that contains personal information about identifiable individuals, and that is used for an administrative purpose Second, with the enforcement of part IV of the Act, Canadian citizens and legal residents are, for the first time, guaranteed the right of access to personal information about them held by the federal government departments and agencies, as well as control of the use to which this information is put and its accuracy.

According to the Act there shall be a minister incharge of federal information banks, who shall cause to be published on a periodic basis, a publication setting forth the name or identification of each information bank, the type of records stored therein, the derivative uses of those records and such other information as is prescribed by the regulations. It is also the responsibility of the minister designated incharge of the federal information to ensure that the federal information bank index so prepared is made available throughout Canada in a manner commensurate with the principle that every individual is entitled to reasonable access to it so as to be able to know its contents [(Section 51(1)(2)] Accordingly, the minister incharge of the Treasury Board has been designated as the minister responsible for the preparation and publication of the federal information bank index An index of federal information banks the first in the series, was released by the minister on March 1, 1978 It presented a complete inventory of all personal information banks held by the federal government--both internal files on government employees and information banks relating to the public at large. The publication lists all the federal information banks that are held by 89 federal departments and non-commercial agencies specifically mentioned in the schedule to the Act.

The index has been organised by departments and agencies Each section relating to a department or agency begins with a short description of the responsibilities and activities of that department, especially as they relate to personal information. This short introduction is followed by a detailed description of every information bank.

Each information bank is identified by a unique number, a title, a short description of contents and a list of derivative and non-derivative uses of the information contained therein. Derivative uses are defined to be those for which the information was compiled, whereas non-derivative uses for administrative purposes, must be authorised by law or else, agreed to by

the individuals themselves.

The index publication is available in post offices across Canada, together with record access forms to provide the initial means of access Some agencies have also arranged to display the index on their premises While the law allows for the curtailment of full description of banks on grounds of national security or defence or certain other grounds, being mentioned below, all federal information banks must be listed There are to be no secret banks.

Having dealt with the federal information bank index at such a length it might be interesting for us to explore the rights conferred by this Act upon the individuals.

Rights of Individuals Under Part IV

The Act gives individuals the right to know if there is any information about them in a federal information bank listed in the index, to know the uses made of that information, to examine their records, to request corrections to their own records where they believe there is an error of omission, or to require a notation to be made to their own record where the department or agency does not agree that a correction is justified. They also are to be consulted by the government agency before information provided by the individuals is used for purposes which are not consistent with the purpose for which it was originally provides [(Section 52(1)(2)]. In practice any individual seeking access to personal information is required to complete the record access form which is available with the index publication in post offices A separate form is required for each information bank which the individual wants to access. The person making the request mails the completed form to the address for that particular information bank which is provided in the index. The government department/or agency must mail either a copy of the material on file or information on where the material is available for scrutiny within 30 days.

Since part IV of the Act is concerned with the protection of privacy, it is felt necessary to balance the ease with which persons can gain access to their own files with safeguards to protect sensitive personal information from being made available to unauthorised individuals. Thus, where a file is sensitive, suitable identification of the requestor is required. Where it is very sensitive, involving criminal records, for example, the person making the request may be asked to come in person to look at the material If a person lives in Calgary and the file requested by him is in Ottawa, the department in question will make arrangements to have the material sent to either its own Calgary office, if there is one, or to the Calgary office of another department with whom it has an agreement for assistance in such cases.

Administration of Part IV

As far as the administration of part IV of the Act is concerned it may be

pointed out that the ministers of government institutions that hold federal information banks are responsible for its implementation and coordination in the departments and agencies they have responsibility for. They are responsible for the approval of exemptions and receive reports of investigation from the PC and take the appropriate action.

Besides, each department and agency has appointed a privacy coordinator whose task it is to ensure that the provisions of part IV of the Act are known and are being observed throughout the department or agency

However, the responsibility for the overall administration and coordination of part IV of the Act is that of the Treasury Board Not only is the Treasury Board responsible for the index publication as pointed out above, it is also responsible for preparing guidelines and procedure manuals for the implementation of part IV of the Act.

The Treasury Board is further responsible for the coordination of the federal information banks Since all collection of personal information implies some intrusion on individual privacy, the Act requires new controls for the governmentwide review of all use that is being made of existing information banks containing personal information, as well as special procedures for approval of new or modified banks. The purpose of these new controls is to eliminate unnecessary collection and ensure additional protection of personal information. In due course, procedures are intended to be established to implement these controls and to eliminate, for example, unnecessary duplication of information demands upon individuals by different government agencies Unlike the other provisions of the Act, the coordination function applies to all personal information, whether it applies to statistical purpose or decisions related to individuals. Forms used for collecting information from individuals have got to be registered. Similarly, individuals must also be informed of the purpose for which information is being collected in relation to the published index.

In case, however, any individual has any difficulty in enjoying the information rights conferred on him by part IV of the Act (and referred to above), he or she can approach the PC for the redress of a grievance or for necessary help

THE OFFICE OF THE PC

Section 58 of the Act constitutes one of the most significant provisions contained in part IV It deals with the functions, procedure and powers of investigation of complaints conferred upon the PC. Hence a detailed examination of this sections seems to be appropriate on our part.

The Functions of the PC

The PC shall receive, investigate and report on complaints from individuals who allege that they are not being accorded the right to which they are

entitled under this part in relation to personal information concerning them that is recorded in a federal information bank [(Section 58(1)]. Nothing however shall prevent the PC from receiving such complaints and investigating them as are submitted not by an aggrieved individual but by a person authorised by him to act on his behalf [(Sub-section (2)]. In regard to the manner of conducting investigations, it has been laid down that every investigation by the PC shall be conducted in private [(Sub-section (3)]. It has been further specified that while conducting an investigation it is not necessary for the PC to hold any hearing and no person is as of right entitled to be heard by the PC. But if at any time during the course of an investigation it appears to the PC that there may be sufficient grounds for making a report or recommendation that may adversely affect any person or any government institution, the PC, before completing an investigation, shall ensure that reasonable measures have been taken to give that person or institution full and ample opportunity to answer any adverse allegation or criticism and to be assisted and represented by counsel for that purpose [(Sub-section (4)]

The Powers of the PC

The PC has, in relation to the carrying out of an investigation, the powers of a human rights tribunal under part III[6] and, in addition to those powers, may, subject to certain limitations as the Governor in Council in the interest of national defence and security may prescribe, enter any premises occupied by any government institution concerned in the investigation and carry out therein such inquiries as the commissioner sees fit [Sub-section (5)].

Unfortunately, however, the PC's role in regard to investigation of complaints is largely restricted and made dependent upon the discretion of the appropriate minister in relation to a government institution by Section 54 of the Act Although the existence of all government information banks must be made known, the Act provides ministers of the crown with the discretion to refuse access to a record contained in an information bank or a certain part of such record when, in their opinion, the record contains information which, if made known:

—might be injurious to international relations, national defence or security or federal provincial relations;
—would disclose a confidence of the Queen's Privy Council for Canada;
—would be likely to disclose information obtained or prepared by any government institution or part of a government institution that is an investigative body

[6]Powers of human rights tribunals to be appointed by the Human Rights Commission from time to time have been dealt with under Sections 39 to 46 of the Canadian Human Rights Act.

—in relation to national security
—in the course of investigation pertaining to the detection or suppression of crime generally, or
—in the course of investigations pertaining to the administration or enforcement of any Act of Parliament;

—might, in respect of any individual under sentence for an offence against any Act of Parliament

—lead to a serious disruption of that individual's institutional, parole or mandatory supervision programme,
—reveal information originally obtained on a promise of confidentiality, express or implied, or
—result in physical or other harm to that individual or any other person;

—might reveal personal information concerning another individual,
—might impede the functioning of a court of law, or quasi-judicial board, commission or other tribunal or inquiry established under the Inquiries Act, or
—might disclose legal opinions or advice provided to a government institution or privileged communications between a lawyer and client in a matter of government business [(Section 54 (a)(b)(c) (d) (e) (f) (g)]

The exemptions from the access, referred to in the above section, are undoubtedly capable of rendering the PC substantially ineffective in the performance of her duties under the Act for the following two reasons First, the task of prescribing the exemptions from access has been left completely with the ministers of the crown Thus, what sort of information would the PC's clients have access to, is to be decided not by the PC but by the minister acting in his discretion Second, the list of exemptions is not only longish but also fairly vague and ambiguous Nowhere in the Act have the terms, 'national security', 'international relations', etc., been defined. Consequently, depending upon his judgement a minister of the crown may enfold anything that he wants within the ambit of these omnibus terms and deny any person a right to personal information. To remedy the provision regarding exemptions we intend to suggest the following First, the discretion to decide about the exemptions should be vested in an independent body like the Supreme Court of Canada rather than in the appropriate minister [7]

[7]After a ruling by the House of Lords in 1968 the doctrine of *Crown Privileges* has been drastically modified. Under the changed situation what information could be withheld in the public interest is to be determined by the courts and not by the minister. For recent developments in regard to administrative secrecy in Britain See: D C Rowat, *Administrative Secrecy in Developed Countries*, New York, Columbia University Press, 1978. Essay on U K. by R E. Wraith, pp 183-210

Second, the omnibus terms such as national defence should be clearly defined in the Act through an amendment Unless this is done, the Act in general, and part IV in particular, shall hardly be of much avail to the people

If a person who intends to utilise the services of the PC is lucky enough to cross the hurdles posed by these exemptions, the PC might be able to investigate his or her complaint(s). After the conclusion of an investigation, however, if the PC finds that the complainant is not being accorded a right to which he or she is entitled under this part in relation to personal information concerning him recorded in a federal information bank, the PC shall provide to the appropriate minister in relation to the government institution that has control of that information bank a report containing·

—the findings of the investigation and any recommendations that the PC considers appropriate; and
—where appropriate, a request that, within a specified time therein, notice be given to the PC of any action taken or proposed to be taken to implement the recommendations contained in the report or reasons why no such action has been or is proposed to be taken [(Section 59(1)].

At the same time, not to let the complainant guessing as to what is happening to his complainant, the PC is also obliged to report to the complainant, or to a person authorised by the complainant to act on his behalf, the findings of the investigation of a complaint But in a situation where a notice has been requested of action taken or proposed to be taken in relation to recommendations of the PC, arising out of the complaint, no such report shall be made by the PC until the expiration of the time within which that notice is to be given to her (Sub-section (2)] But in a situation where a notice has been requested of action taken or proposed to be taken in relation to recommendations of the PC and no such notice is received within the time specified for it, or the action described in the notice is inadequate or inappropriate or will not be taken in a reasonable time, the PC shall so advise the complainant and may include in the report such comments on the matter as she thinks fit [(Sub-section (2 1)].

The PC shall, within five months after the end of each year, and such other times as are appropriate, transmit to the Minister of Justice a report on the activities of the office since the date of last such report. And the Minister shall cause each such report to be laid before parliament within fifteen days after its receipt or, if parliament is not in session, on any of the first fifteen days after the commencement of its sitting. In any report submitted by the PC to parliament, the PC shall take every precaution to avoid revealing personal information and any matter which might relate to any of the exempted items mentioned by us above [(Section 60(1)(2)].

A discussion of some of the general provisions as well as the provisions contained in part IV of the Act above shows that they create quite a weak

institution, that is, the office of the PC, for the protection of peoples' information rights. What kind of impact does it have on the performance of the role of the PC is a question worth looking into. This is what is being attempted below.

THE PC AS AN INFORMATION OMBUDSMAN

Although one may not quite agree with the applicability of the ombudsman concept to the position of the PC, some of the provisions of the Act like removal by the Governor in Council on an address of the two Houses of Parliament, do bestow upon it the semblance of a specialised ombudsman. We are, therefore, convinced that it would be really worthwhile to examine the role of the PC in the light of the ombudsman rhetoric

Most of the rhetoric about the need for an ombudsman is rather vague about the kinds of matters citizens or people would like to bring to him. But that rhetoric's dominant theme is that he is a 'peoples' protector' against the depredations of government. By virtue of its universal accessibility and expertise in public administration, the ombudsman is able to provide speedy justice to the citizens against public administration without any extra cost to them. No doubt, this vague rhetoric of ombudsman as the 'peoples' defender' becomes still less intelligible when the scope of an ombudsmanlike official is confined to a specialised area. Nevertheless, it perhaps constitutes the only logical criterion for analysing the role of the PC in a critical manner. For a detailed examination of the PC's role in the light of the rhetoric of the 'peoples' defender' one must try to seek answers to the following questions: 'How many people make use of the services provided by the PC and in what manner?' 'How many of those who approach the PC for help are finally helped by her and in what manner?' 'Who seeks her help?' 'What sections or regions of the Canadian society do PC's clients come?'

WHO AVAILS OF THE PC'S SERVICES?

In order to examine the questions raised above let us have a look at the nature and volume of work handled by the PC since the inception of her office An examination of this issue is necessary because, 'what if Canada had a PC and nobody ever utilised her services?' Fortunately enough, that eventuality never arose in relation to the office of the PC Requests by people for information had begun pouring in four months before the PC's office commenced its functions Similarly, complaints had also started flowing in within one month of the inauguration of the PC's office. Table 1(A) shows the total number of requests received by or in behalf of the PC during April, 1978 to July, 1979. The Table indicates that whereas the number of requests received from the people varied between a minimum of 10 to a maximum of [illegible]

127 during 1978. the

report were 57 to 76. In overall terms, whereas 611 requests were received by or in behalf of the PC in 1978 the corresponding number for six months of 1979 was 391. On an average, a large number of requests per month were received during 1979. Likewise, Table 1(B) shows that during the first nine months of 1978 a comparatively larger number of complaints were submitted to the PC by her clients than those during the subsequent seven months of 1979. The range of complaints showed a distinctively downward trend during 1979 in comparison with that of the year 1978. In overall terms, a total of 576 complaints were submitted to the PC during 1978 and 216 during 1979. A comparison of Table 1(A) and 1(B) indicates an interesting trend in regard to the ratio between the requests and complaints received by the PC The data ostensibly give the impression as if there is an inverse relationship between the number of requests and complaints received by the PC during the years 1978 and 1979. When the number of monthly requests received by the PC happens to be high, as was the case in 1978, the number of complaints goes down. Conversely, when the number of requests goes down in 1979 the number of complaints goes up

Unfortunately, however, we are hardly in a position to offer any satisfactory explanation either in regard to the trend referred to above or the monthly fluctuations in the number of requests, on the one hand, and the number of complaints, on the other. Similarly, we also do not have any scientific criterion or criteria for judging whether the average level of complaints and requests submitted to the PC during the period under report is high or low Nevertheless, looking to the experiences of other countries

TABLE 1A REQUESTS RECEIVED BY THE PC DURING APRIL 1978 TO JULY 1979

Month	1978 *No*	1979 *No.*
January	10	71
February	19	63
March	127	57
April	101	62
May	55	76
June	70	62
July	55	N.A
August	30	N A
September	43	N A
October	31	—
November	43	—
December	27	—
Yearly Total	611	391
$\bar{X}$	51	65
Grand Total	1,002	

SOURCE: *Information Supplied by the Secretariat of the Privacy Commissioner*, Ottawa.

during the initial years of the implementation of their general ombudsman plans and those of the provincial and other ombudsman plans in Canada, the average number of complaints and requests received by the PC appears quite high. Such an assertion on our part seems to be appropriate and justifiable, especially in view of the restricted and specialised jurisdiction of the PC.[8]

TABLE 1B COMPLAINTS REGISTERED BY THE PC DURING APRIL 1978 TO JULY 1979

1978		1979	
Month	*No.*	*Month*	*No*
April	54	January	61
May	72	February	38
June	114	March	32
July	93	April	12
August	94	May	32
September	38	June	19
October	33	July	22
November	47	August	N A
December	31	September	N A
Yearly Total	576		216
X̄	64		39
Grand Total			792

SOURCE As in Table 1A

We might further add that the act of approaching an agency like the PC, on the part of a person, for help is a demand behaviour. Hill was perhaps the first social scientist who attempted to develop a classification scheme for the categorisation of demand behaviour such as the act of complaining According to him, complaints, especially to an ombudsman, may be classified into two broad categories: the 'offensive' complaints and the 'defensive' complaints If the complainant wishes either to extract something from the department or to criticise an action or the quality of an action it has taken, his complaint takes the form of an offensive demand But if he simply wishes to defend or protect himself against an action or contemplated action by the bureaucracy and lodges a complaint, his complaint is of a defensive nature After a considerable amount of thinking we reached the conclusion that the classification—'defensive' and 'offensive' complaints—could be gainfully employed by us for analysing the role of the PC in the light of the ombudsman rhetoric With this intention, we thought that we could treat the complaints submitted by the PC's clients as the 'offensive' complaints and the requests

[8]For one such provincial experience cf Sharma, *op cit*, p. 1119

for information as the 'defensive' complaints. If the rhetoric of 'peoples' defender' is to hold, a vast majority of complaints submitted to the PC must be of a defensive nature rather than of being offensive. The last rows of Tables 1(A) and 1(B) respectively show that this was exactly the case. On the basis of these facts therefore we could argue that the PC has really been acting as the 'peoples' defender'. Her role, so far, has clearly been that of the personal information ombudsman of Canada.

The foregoing facts however tell us little about the actual number of complaints redressed by the PC and the final consequences of the latter's action in regard to those complaints A cursory look at the data depicted in Table 2 gives us the answer to the question raised above. It shows that a vast majority of complaints remain pending during the month of their submission or may be even longer. The percentage of complaints that has remained pending during the month of their submission ranges from a minimum of 66.6 to a maximum of 100. Needless to add that the percentage of complaints in which either a satisfactory explanation or other necessary assistance has been given to the complainant is extremely low. By and large, equally low has been the percentage of cases in which a final resolution of the complaint has taken place or proven justified within the same month. But the element of delay hardly has anything to do with the efficiency of the PC or her secretariat. It is in fact to a very large extent inbuilt in the Weberian concept of bureaucracy as well as in the provisions of the Act itself. Section 59(2), referred to above, provides sufficient opportunity to the Canadian bureaucracy for delaying their response to the queries received from the PC. The net result therefore is that prompt remedial action by the PC takes place in a marginally small number of cases. The delay on the part of the PC in the disposal of peoples' grievances might have been the main cause of the lower number of complaints to her during 1979.

Having looked at the numbers of requests and complaints submitted to, and the manner in which they were disposed of by the PC, it seems logical to ask. 'Which agencies or organisations of Canadian public administration have been the targets of larger number of complaints and why?'

THE MAJOR TARGETS OF COMPLAINTS

During the period—April, 1978 to July, 1979 (both months inclusive), not all of the within-jurisdiction or scheduled agencies have been the targets of complaint by the PC's clients. Of the 89 scheduled agencies[9] of the federal government only 34 were actually complained against. And out of these 34 a vast majority, that is, 24 agencies, accounted for less than ten complaints each during the entire period. We, therefore, arbitrarily decided to treat these

[9] These agencies have been referred to as the scheduled agencies because of their specific [illegible] in the schedule to the Human Rights Act.

TABLE 2 MODE OF DISPOSAL OF COMPLAINTS BY THE PC DURING APRIL 1978 TO JULY 1979

Mode	1978-1979																*Total*
	Apr.	*May*	*Jun*	*Jul*	*Aug*	*Sep*	*Oct*	*Nov*	*Dec*	*Jan*	*Feb*	*Mar*	*Apr*	*May*	*June*	*July*	
Justified	—	—	3	—	7	—	—	—	—	8	—	—	—	—	—	—	18*
Dismissed	1	1	—	1	—	—	—	1	—	4	—	—	—	—	3		11
Explanation	14	10	3	5	1	2	—	—	—	2	—	—	—	1	—	1	39
Assistance	2	8	—	—	—	—	—	—	—	—	—	1	—	—	—	1	12
Referral	—	—	4	1	—	1	—	—	—	—	1	—	—	—	—	—	7
Resolved	—	3	9*	1	8†	—	—	—	—	11‡	—	1	—	—	4	3	40
Pending	36	49	101	85	85	35	33	46	31	43	38	30	12	31	10	17	682
Withdrawn	1	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	1
Miscellaneous	—	1	—	—	—	—	—	—	—	1	—	—	—	—	2	—	4
Column Total	54	72	120	93	94	38	33	47	31	61	38	33	12	32	19	22	792

SOURCE: As in Table 1A.
* Includes 3 complaints justified.
† Includes 7 complaints justified.
‡ Includes 8 complaints justified

24 agencies as minor targets of complaint and the remaining ten as the major.

Table 3 summarises the entire position regarding the number of complaints accounted for by each one of the ten principal targets of complaints. It is absolutely clear from the data that the Canadian Penitentiary Service accounted for the highest percentage of complaints not only among the principal targets of complaints but, also, in overall terms. The Royal Canadian Mounted Police accounted for the second highest number of complaints, that is, over 10 per cent. On the whole the ten agencies accounted for 703 complaints or 88.7 per cent of the total complaints submitted to the PC during this period. The remaining 24 agencies accounted only for the remaining 11.3 per cent complaints. These facts therefore provide clear guidance to the Treasury Board (the principal administrative agency responsible for the implementation of part IV of the Act) as to where it should concentrate its main efforts for achieving substantial results in regard to the freedom of information rights of the people.

TABLE 3 MAJOR TARGETS OF COMPLAINTS TO THE PC BY RANK ORDER DURING APRIL 1978 TO JULY 1979

Agency-Name	*No. of Complaints*	*Per cent Complaints*
Canadian Penitentiary Service	465	66.1
Royal Canadian Mounted Police	72	10 2
Dept. of National Defence	38	5.4
Canadian Employment & Ins Comm.	37	5.2
National Parole Board	27	3.8
Public Service Commission	15	2.1
Dept. of National Revenue (Tax.)	13	1.8
Dept. of Veterans Affairs	13	1.8
Dept. of National Health & Welfare	12	1.7
Dept. of National Justice	11	1.5
Total N	703	
Percentage of Grand Total of Complaints	(88.7)	

SOURCE: As in Table 1A.

COMPLAINTS AND INSTITUTIONAL CLASSIFICATION

In order to understand why certain types of agencies (like the one referred to above) are targets of greater complaints than others, it might be hypothesised that the organisations or agencies that come into more direct contact with the public are normally likely to be subject to greater complaints by people than others which come into less direct contact.[10] It may be further

[10]Larry B. Hill, *The Model Ombudsman: Institutionalizing New Zealand's New Democrating Experiment*, Princeton, N.J., Princeton University Press, 1976, p. 79.

hypothesised that even among the agencies coming into more frequent contact the ones charged with 'secretive-regulatory' kind of work, *e g* , police, taxation, correctional services, etc , are likely to surpass others belonging even to the same category. While studying the 'client-public agency' relationship Hill developed a threefold typology: the 'client-serving' organisations, the 'client-attending' organisations and the 'non-client-oriented' organisations [11] It might be quite appropriate for us to employ the same typology for examining the 'client-agency' relationship in the context of the role of the PC. While doing so, "in more specific terms, we could hypothesise that the 'client-attending' institutions would account for the largest number of complaints because of the often aversive nature of their contacts with the citizens, that 'client-serving' would be the second and that non-client oriented would rarely offend the public "[12]

For examining the aforementioned specific hypothesis we classified the 30 federal agencies complained against by the PC's clients (according to the predominant nature of their responsibilities) into the three categories The agencies belonging to each one of these categories together with the number of complaints against each one of them are shown in Table 4 As predicted, fewer—74 or 9.6 per cent—complaints were filed against non-client-oriented agencies even though that classification included exactly the same number of agencies as did the other two The distribution of the remainder complaints among the ten client-serving and the ten client-attending agencies also fulfilled our expectations Whereas the client-serving agencies accounted for 105 or 13.7 per cent complaints, the client-attending, 588 or 76 6 per cent, of the total number of 767 purposively sampled complaints In overall terms, the thirty sampled agencies accounted for nearly 96 8 per cent of the total number of 792 complaints submitted to the PC during the period under report Hence, this aspect of our analysis of the facts also substantiates the role of the PC as the personal information ombudsman.

Nevertheless, our examination of the PC's role would remain incomplete unless we deal with the most significant aspect of it, that is, "Who complains to the PC and why?"

WHO COMPLAINS AND WHY

Now since we know how many requests and complaints are submitted to the PC and against which agencies are these complaints directed, we must proceed to examine the question—'who uses her office?' The two issues—how many complaints are submitted and against whom—are interrelated. The one cannot be properly and fully examined and interpreted without taking into account the other In order to make the theoretical focus of our paper

[11]For a rationale underlying this classification see Larry & Hill, *op. cit* , pp 89-90
[12]*Ibid* , p 91.

TABLE 4 CLASSIFICATION OF COMPLAINTS SUBMITTED TO THE PC BY AGENCY TYPES DURING APRIL 1978 TO JULY 1979

Client-Serving Agencies		*Client-Attending Agencies*		*Non-client-oriented agencies*	
Name	*No.*	*Name*	*No.*	*Name*	*No.*
Can. Mortgage & Housing Corpn.	3	Canadian Penitentiary Serv.	465	Dept. of National Defence	38
Can Employment & Ins. Comm.	37	Dept. of National Rev. (Tax.)	13	Dept. of External Affairs	3
Dept. of Agriculture	1	Canadian Radio & TV Comm.	2	Dept. of Justice	11
Dept. of Consumer & Corp. Aff.	4	Dept. of Indian & Nor. Aff.	3	Dept. of Industry, Trade & Commerce	2
National Harbours' Board	5	Dept of Post Office	7	Privy Council Office	5
Dept. of Nat. Health & Welf.	12	Public Service Commission	15	Dept. of Solicitor General	9
National Parole Board	27	Royal Can. Mounted Police	72	Dept. of Public Works	1
Dept. of Veterans Affairs	14	R.C. (Customs)	5	Ministry of Transport	2
Unemployment Ins. Commission	2	Dept. of Supply & Services	6	Dept. of Secretary of State	3
Total	105		588		74
N 767	(13.7)		(76.6)		(9.6)

SOURCE: As in Table IA

rather explicit, it might be argued that the PC's clients (*i e.*, her complainants) are involved in a pattern of consumption of 'politco-legal' services which could be labelled as demand behaviour Because they essentially define the PC's institutional parameters, identifying the clients is of crucial importance. Whom we would expect to complain to the PC actually depends upon our perception of what it means to complain All that we could be cocksure about the complainants is that they were themselves unable to, or, incapable of, reckoning with the administration Hence they wished a 'trouble-shooter', that is, the PC to come to their rescue Such a behaviour of complaining on their part may be subjected to two divergent interpretations in this particular context: (*i*) complaining to the PC is an act of assertion of one's fundamental human 'right to know'—that except for jurisdictional barriers to access, her clients should represent a fair cross-section of the Canadian populace; or (*ii*) complaining to the PC is a deviant act—hence her clients are most likely to be unrepresentative of various sections of the Canadian society We intend to explore below, which one of the two interpretations fits the PC's role more appropriately

In terms of the complainants' barriers to access to the PC these are relatively greater To begin with, the very specialised and statutorily restricted jurisdiction of the PC may be recalled The long list of exceptions prescribed under Section 54 of the Act (and reproduced above), really makes the services of the PC highly inaccessible for a person. In this behalf, we are quite inclined to fully agree with Ged Baldwin's view that:

> But for the ingenuity and boldness shown by Inger Hansen, the present incumbent to the office of the PC, part IV of the Human Rights Act would not have been worth a damn It would have been absolutely useless and unworkable [13]

Thus, if somebody is able to utilise the services of the PC despite these rather extensive exemptions provided for in the Act, he or she should congratulate Inger Hansen and one's good luck.

Then, there are further barriers to access to PC in terms of the federal jurisdiction as well as the territorial jurisdiction Only federal agencies specifically mentioned in the schedule to the Act may be complained against But even in regard to these agencies, their offices located outside the territorial jurisdiction of the Canadian State cannot be complained against.

Nevertheless, the most common barrier—a written and duly signed complaint—does not apply in regard to the mode of complaint adopted by the

[13]These views were expressed by Ged Baldwin (a P C M P , and a renowned champion of the freedom of information and protection of personal privacy in Canada), at a seminar on freedom of information organised by the Department of Political Science, Carleton University, Ottawa, and the *Access* at the Carleton University, in November, 1978 The author participated in the seminar as a rapporteur.

PC The PC accepts even telephonic, telegraphic and verbal complaints. At times anonymous complaints are also accepted by the PC so as to relieve a complainant from the fear of possible reprisal or retribution by an administrative authority.

The barrier or citizenship or a landed-immigrant status which the Canadian bureaucracy seems to apply ritualistically in almost all situations is also not applicable in regard to the complaints procedure adopted by the PC. All persons who have lawfully entered Canada may complain to the PC. Further, no fee whatsoever is charged by the PC from her complainants.

In sum, therefore, we could say that what makes the PC's services most inaccessible is basically the wide and vague exemptions provided for under Section 54 of the Act Given the necessary will on the part of a person, except for the above section, no serious hurdle stands in his way towards submission of a complaint to the PC.

Hence, given the above jurisdictional and statutory impediments involved in complaining to the PC, we intend to find out what kind of complainants—deviant or representative—does such an arrangement produce.

THE PC'S CLIENTS. A PROFILE

The following account regarding the social profile of the PC's clients is intended to answer the question whether the act of complaining to the PC is an act of assertion of one's rights or a deviant act pursued by a handful of unrepresentative Canadians

First of all we intend to find out : from which geographic regions of Canada do the PC's clients come? Table 5 shows the distribution of the PC's clients over the Canadian provinces The facts contained in the table show that a vast majority of the PC's clients come from Ontario although various other provinces are also represented, that in spite of the high population, residents of Quebec are represented in very small number. The two

TABLE 5 PROVINCIAL DISTRIBUTION OF PC'S COMPLAINTS—APRIL, 1978 TO JULY, 1979

Province/Territory	*No of Complaints*	*Per cent*
1. Alberta	2	4 8
2 British Columbia	5	12.2
3 Manitoba	4	9 7
4 Nova Scotia	2	4 8
5. Ontario	22	53 6
6 Quebec	2	4 8
7 Saskatechewan	1	2 4
8 Yukon & NWT.	2	4 8
9. Missing Values	1	2 4
N	41	

provinces, namely, New Brunswick and the Prince Edward Island (PEI), are not represented at all among our respondents. However, the relatively higher percentage of Ontarians among our respondents, on the one hand, and an equally lower percentage of *Quebecois*, on the other may be explained respectively in terms of: (1) a higher population of Ontario and the location of the PC's headquarters in Ottawa; and (2) our inability to prepare a French version of the questionnaire schedule. To a certain extent, the non-representation of the residents of New Brunswick might also be for the same reason as that in the case of Quebec. However, the non-representation of PEI cannot be attributed to any other reason except to the element of chance. Nevertheless, if we do not take the specific proportions into account, the facts do indicate that geographically speaking the PC's clients do come from all across the country

In regard to the sex of the PC's clients Table 6 indicates that a vast majority of them—85.3 per cent—are males Women are underrepresented. Since, however, the Act permits an aggrieved person to nominate any one else to petition on his or her behalf, we could safely assume that in order to save their female family members and friends from unnecessary trouble, many of the PC's male clients must have in fact represented them.

TABLE 6 PC'S CLIENTS DURING APRIL, 1978 TO JULY, 1979 BY SEX

Sex	*No*	*Per cent*
Male	35	85 3
Female	6	14 7
N=	41	

Further, a look at the data contained in Table 7 shows that, in terms of their age, the PC's complainants come from all the four categories, that is, young, middle-aged, old and very old Although there is a predominance of middle-aged persons among the PC's complainants, other age-groups are also represented Especially, persons belonging to the old age group are also represented is a fairly high proportion among PC's clients The reasons for the relative over-representation of the middle and old-age groups are not difficult

TABLE 7 AGE DISTRIBUTION OF THE PC'S COMPLAINANTS

Age-group	*No.*	*Per cent*
1 Young (below 25)	4	9 7
2 Middle-Aged (between 26 and 50)	23	56 1
3. Old (between 51 and 75)	13	31.7
4 Very Old (between 76 and 100)	1	2 4
N=	41	

to seek.[14] The years of life, between 26 to 75 years of age, perhaps constitute the period when one is more active in one's capacity as the subject or client of administration. Hence people belonging to these two age groups are bound to come into greater contact with the administration and, consequently, experience a greater amount of displeasure and discomfort at the hands of the latter. Logically speaking, therefore, they are likely to dominate the number of complainants of the PC or any similar authority

In regard to marital status, there is a preponderance of married persons among the PC's clients. The remaining marital status categories are also represented though unmarried persons count for a larger number of them than the rest. Table 8 depicts the whole picture in regard to the representation of marital status categories among the PC's clients.

TABLE 8 MARITAL STATUS OF THE PC'S COMPLAINANTS

Status-Category	*No*	*Per cent*
Married	23	56.1
Single	8	20 5
Widowed	2	5.1
Separated	5	12 8
Divorced	3	7.6
N=	41	

In a multi-cultural society like Canada, the representation of various linguistic groups among the PC's clients also assumes a great deal of importance. Table 9 shows that so far there has been a predominance of anglophones among the PC's clients Part of this higher percentage of anglophones among the PC's clients might seem to be justified on account of their relatively higher percentage in the total population. But a greater part of this high percentage may more appropriately be attributed to our inability to prepare a French version of the questionnaire and the poor rate of our responses.

TABLE 9 MOTHER TONGUE OF PC'S COMPLAINANTS

Language	*No.*	*Per cent*
English	35	85 3
French	2	5 1
Hungarian	1	2.4
Ukranian	1	2 4
Urdu (Paki)	1	2 4
Chinese	1	2 4
N=	41	

[14]This is just an arbitrary classification of age groups. It is, however, in no way intended to offend our anonymous respondents some of whom may not quite like this classification

We assume, a large number of our sampled non-respondents were from amongst the Frenchphones. But, in spite of the constraints under which this research effort was pursued, Table 9 does indicate the fact that the PC's respondents came from a varied range of linguistic groups

Facts in regard to race/colour of the PC's clients show that the persons belonging to the white race, that is, the caucasians predominate the number of PC's clients. They account for nearly 92.6 per cent of the PC's clients The figure seems to be somewhat high even while compared with the approximate proportion of white population in Canada In any case, however, three other races/colour are also represented among the PC's complainants. Hence, ignoring their numbers or, their proportions in the Canadian population, we could still say that the PC's clients come from different racial/colour groups.

TABLE 10 RACE/COLOUR OF PC'S COMPLAINANTS

Race/Colour	*No.*	*Per cent*
White/Caucasian	38	92 6
Indo-Pakistani	1	2 4
Chinese	1	2 4
Ukranian	1	2 4
N=	41	

A probe into the religious affiliations of the PC's clients reveals that the Protestants account for the highest percentage of her clients, the Catholics for the second highest and the atheist for the third. Other religious groups like the Jewish, Buddhist, etc , are also represented. Table 11 on the whole gives the impression that the PC's clients come from a fair cross-section of the religious groups comprising the Canadian population.

TABLE 11 RELIGIOUS AFFILIATIONS OF THE PC'S COMPLAINANTS

Religion	*No.*	*Per cent*
Protestant	18	44 0
Roman Catholic	9	22 0
Jewish	2	4 8
Buddhist	1	2 4
Anglican	1	2 4
Orthodox	1	2 4
Yoga Karma	1	2 4
Atheist	8	19 5
N=	41	

A greater amount of heterogeneity, however, is evidenced by Table 12 depicting educational qualifications of the PC's complainants. The data in the Table indicate that those having below high school or high school and

bachelor's degree qualifications account for approximately the same percentage of the PC's clients. Besides these, those having a Master's or Ph.D. degrees are also represented but their numbers are not very significant. Nonetheless, the facts indicate that, in terms of their educational qualifications, the PC's clients come from a cross-section of various educational groups or levels.

TABLE 12 EDUCATIONAL QUALIFICATIONS OF THE PC'S COMPLAINANTS

Qualification Level	*No.*	*Per cent*
Below high school	9	22.0
High school	10	24 3
Bachelor's degree	10	24.3
Master's degree	4	9.7
Ph.D degree	2	4 8
Others	5	12.2
N=	41	

A cursory look at Table 13 shows that, in terms of their income levels, the PC's complainants come from a fairly heterogeneous section of the Canadian. The interesting fact that the Table brings out is that those with an annual income of less than $ 5,000 and those with an income between $ 21,000 to $ 30,000 account for the same proportion of the PC's complainants. The remaining income categories are also represented among the PC's clients.

TABLE 13 INCOME DISTRIBUTION OF THE PC'S COMPLAINANTS

Income-Bracket	*No.*	*Per cent*
Below $ 5,000 p a.	10	24 3
Between $ 6,000 and 10,000 p a	7	17 0
Between $ 11,000 and 20,000 p a.	4	9.7
Between $ 21,000 and 30,000 p a	10	24.3
Between $ 31,000 and 40,000 p a.	5	12 2
Above $ 41,000 p a	5	12.2
N=	41	

A further probe into the social position of the PC's clients revealed that the 'lesser executive, professional and proprietorial' class accounted for the highest proportion among them The class of 'higher executive, professional and proprietorial' class accounted for the second highest number of the PC's clients with the skilled workers class coming very close to it. Nevertheless, all of the remaining professional classes were also represented Table 14(A) shows the entire picture in regard to status levels of the PC's complainants.

TABLE 14A SOCIAL STATUS OF THE PC'S COMPLAINANTS

Position	*No.*	*Per cent*
Higher professional, executive and proprietorial class	7	17 0
Lesser, executive, professional and proprietorial class	16	39.0
Clerical	3	7.3
Skilled workers	6	14 6
Semi-skilled workers	4	9.7
Missing values	5	12 2
N=	41	

TABLE 14B PROFESSIONAL AFFILIATIONS OF THE PC'S COMPLAINANTS

Profession	*No*	*Per cent*
Administration/Management	10	24 3
Armed Forces	3	7 3
Computer/Financial Analyst	4	9 7
Consultancy	2	4 8
Engineering	1	2 4
Law	1	2 4
Medicine/Psychology/Psychiatry	3	7 3
Teaching/Research/Student	3	7 3
Self-Employed	2	4 8
Retired	3	7 3
Disabled	2	4 8
Others	2	4 8
Missing Values	5	12 2
N=	41	

Last but not the least, an examination of the professional affiliations of the PC's clients showed that those belonging to the administrative/managerial professions made the highest use of the service of the PC. Though a fair cross-section of professional people were represented among the PC's clients, their numbers were relatively small

Hence the facts discussed above lend considerable amount of support to the first hypothesis: that the act of complaining to the PC is an act of assertion of one's information rights under part IV of the Act; therefore, the PC's clients come from a fairly representative group of the Canadian society.

The entire discussion of the role of PC in the light of the ombudsman rhetoric of 'peoples' protector' shows that despite the statutory constraints imposed upon the PC by Section 54, the PC has been able to play her role as the information or privacy ombudsman quite effectively.

In view of the foregoing discussion of the role of the PC what possible word of advice do we have for the Canadian people. Should we advise them to rejoice in the limited success achieved by the PC and therefore sit quiet or,

instead, caution them to rise to the occasion and take timely action. We suppose we would prefer to follow the latter course than the former in terms of our advice to our fellow Canadians. The piece of advice we intend to pass on to Canadians runs somewhat along the following lines.

The PC Government led by Prime Minister Clark, being in the first flush of power, seems to be currently very enthusiastic about building an open system of administration in Canada. That the law on freedom of information is among the highest priorities of the Clark Government is common knowledge in Canada today. Most likely, a draft Bill on freedom of information would be introduced in the very first week of the ensuing Fall 1979 session of the Canadian parliament The political atmosphere in the country is surcharged with debates and discussions as to what shape the proposed law on freedom of information should take. In pursuance of their avowed intention to bring about an open system of administration the PC Government have also of late pronounced their intent to overhaul the Canadian Official-Secrets Act by the Spring of 1980 [15] It is basically this archaic law based upon the British Official Secrets Act of 1911 which has served as the Canadian public servants testament while dealing with the peoples' requests for information. Whereas administrative practices and court judgements have brought about substantial changes in the operation of the British Official Secrets Act recently, no efforts whatsoever have been made in Canada to change this law during the last four decades Thus the unfortunate combination of public servants official obligations with what was originally intended to deal with the problems of espionage has led to prescription of similar legal obligations upon the public servants and those considered a national security risk. Needless to add that this unimaginary combination in the official secrets law has had considerable intimidating effect upon the morale of public servants while parting with even routine types of information. Besides, to certain unscrupulous public servants and politicians the secrecy law comes quite handy to cover up their misdeeds.

Once however this law is overhauled, either by way of a clear definition of the public servants' information obligations or its complete separation from the law for controlling espionage, etc , much of the administrative secrecy would perhaps vanish in the natural course But, in the meanwhile, the important thing for Canadians to remember is that they have to work hard to ensure that the proposed laws on freedom of information and official secrecy are: (1) enacted in very specific and clear manner; (2) that only minimum and unavoidable exemptions are prescribed under them; and (3) that they are in tune with the requirements of an open system of administration. But they must not lose any time. In a nutshell, what we intend to suggest is. Hit the iron when it is hot. No sooner these three objectives are achieved, the task of the PC would be automatically smoothened to a

[15]*The Globe and Mail*, Toronto, September 20, 1979.

considerable extent With minor changes in the provisions dealing with the powers and status of the PC, suggested by us above, the PC would be able to make a much stronger impact upon the functioning of Canadian public administration

Should however the Canadians wish not to heed our advice, such an opportune moment would perhaps never return. With the passage of each day in their office both Clark and his colleagues would grow wiser about the advantages inherent in a closed system of administration and become less and less averse to such 'idiosyncratic' values as an open system of administration. The choice is entirely of the Canadian people, they may choose whatever they want. But they must not however forget that if they were to lose this opportunity, they would have lost it for a long time to come [16]

□

People's Right to Information

> If government is to be truly of, by, and for the people, the people must know in detail the activities of government Nothing so diminishes democracy as secrecy. Self-government, the maximum participation of the citizenry in affairs of state, is meaningful only with an informed public How can we govern ourselves if we know not how we govern? Never was it more important than in our times of mass society, when government affects each individual in so many ways, that the right of the people to know the actions of their government be secure
>
> —Foreword, The Limited States, Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, 1966

[16]In India, after the defeat of Mrs Indira Gandhi and her Congress Party in the national election of March, 1977, the then Janata Party led by Shri Morarji Desai also started functioning with an equal amount of vigour and enthusiasm for restoring the civil liberties of the people and reforming administration However, within less than a year of their experience in office both Desai and his other party colleagues realised that these measures were no good. It is alleged that in regard to coercing the Indian press and the media the Janata leaders did not lag far behind Mrs Gandhi Hence, this advice.

The Open Government and Its Enemies (With Apologies to Karl Popper)

K. Seshadri

ONE OF the essential features of democratic government is the enlightenment of the citizenry which enables it to participate meaningfully in the political process. Participation could be positive in the sense of supporting the government in power in its actions or negative in the non-pejorative sense of the term, which means protesting and opposing the polices of the government in power. This participation may be at various levels of involvement. But the important thing is that the citizenry be well informed in order to make its participation a real input into the system. Hence it is that there should be freedom of expression which would include freedom of the press and other mass communication media which should become forums for free expression of views without let or hindrance and without the fear of hearing, 'the knock at the doors of one's house in the early hours of the morning'[1] The right to protest against the actions of a government is a fundamental right and a proper assertion of this right keeps the governments on the democratic path of not only being responsible but also responsive The concept of civil disobedience of Henry David Thoreau from whom Gandhi developed the political movement of civil disobedience is an expression of this right

The political system in a democracy works on a delicate balance and seeks to maintain this balance by acting on the enlightened and informed criticism. In order, therefore, to secure meaningful participation of the enlightened people, they should have access to all that passes in the administration, as otherwise, they will be reduced to the position of subjects Thomas Jefferson asserted that people have the right to alter the government which becomes destructive, 'alter it or abolish it' President Wilson went to the extent of asserting that there should be 'growlers and kickers'. "We have forgotten the very principles of our origin", he said, "if we have forgotten how to object, how to resist, how to agitate, how to pull down and build up, even to the extent of revolutionary practices, if it be necessary to readjust matters". I am deliberately quoting these two leaders and not any revolutionary leader only to emphasise the importance of dissent for the proper functioning of political leadership.

For all these declarations, in actual practice, governments seek to cleverly

conceal what transpires, and give out only such information as is good in the 'public interest' to be revealed The questions that are pertinent here are: (*i*) What is public interest? Who is to decide what is in the public interest and what is against it? (*ii*) How to prevent the lurking danger of tyranny that thrives under secrecy? (*iii*) If the objective is to have informed citizenry, how can that be achieved without giving it access to all the transactions that the big government does in its name? If certain types of information are made available to the public at large. how to prevent the damage that might be caused to public tranquillity and national security? Before answering these questions, it is worthwhile to ponder over the dialectic of the coexistence of information explosion of the modern days and the non-availability of strategic and sensitive information.

In the following lines we shall deal with the factors that have led to this paradox.

THE THEORY OF SEPARATION OF POWERS

This theory came in the wake of democracy so as to enable the different sections to act as check against each other's powers In a multi-class society this guaranteed the equal representation in the sharing of power to every class Montesquieu felt that the concentration of the powers of law-making and law-enforcing and law-interpreting in the hands of one person or a group of persons, either elected or nominated, would be the very definition of tyranny In operational terms this theory requires certain sequence in the functioning of governments—that is, the legislature as the representative of the people at large should first debate and the debate should be an open debate. After fully debating any question, by a majority, it should pass the legislation which the executive has to then translate into action and submit itself to the judicial review in case there is a charge of excess or any other type of arbitrariness in so translating the will of the legislature This has eroded. Executives have become powerful and very often bypass the legislature.

POLICY-MAKING

The orthodox separation of powers is impossible and every student of political science knows how these three wings keep transgressing and poaching into the realms of the other. But the most important thing here is the ascendency of policy over legislation. This alters the old order of precedence. The executive lays down the policy in the administrative corridors and goes ahead pursuing this policy and, in course of time, seeks the ratification of the legislature for the action already launched. If it fails to obtain the legislative approval it quits, but this is rare, because of the functioning of the political parties. Mostly policies are decided upon elsewhere and they are very often ritualistically placed before the legislatures for this *ex post facto*

approval. The reason for this development is the complicated and highly specialised knowledge that is required to do the business of government in the modern days.

In the US, there has been an allegation that the executive has been successful in circumventing the provisions of the constitution, as stated in Article 2, Sec. 2 wherein the Senate is given the power of veto over commitments made to another country by virtue of treaty that it may enter into. The executive enters into what is called the 'executive agreement' which does not have any constitutional sanction. As an example of the proliferation of these executive agreements may be mentioned the following facts. In 1920 the US had entered into 25 treaties and only 9 executive agreements. But by 1968 it concluded 16 treaties and 266 executive agreements. By the end of 1971, it had a total of 947 treaties and 4,359 executive agreements.

The plea is that disclosures of certain actions of the executive would be prejudicial to the security of the state.

SCIENTIFIC AND TECHNOLOGICAL REVOLUTION

Policy-making today even in a less advanced country cannot but be influenced by the advances in science and technology. The legislators are generally lay men who do not understand the complexities of the modern days and to go back to the days of Montesquieu is a far cry. Let me quote Robert A. Dahl.

> It may have been realistic for Rousseau or Jefferson or the framers but it would be profoundly unrealistic today to expect citizens, or even highly educated ones, to have enough technical knowledge. Think of the complexities of current policy decisions: breeder reactor, B-1, Trident, Middle East, catalytic converter, inflation-unemployment trade-offs, rate of increase in money supply, costs and administrative problems of alternate health care arrangements, SST, Amtrack, limitations on artificial losses, outer continental shelf.... Most of the time—all of us are ordinary citizens without a great deal of technical knowledge about matters like these.[1]

One wonders whether many of our legislators have heard of some of these things. Modern governments cannot be run on emotional shouting regarding the introduction of Hindi terminology in the armed forces while the more important technical problems of defence stare us in the face nor can populistic rabble-rousers on cow slaughter or some such slogans take the society forward and assure better living to its people. One should think several times before

[1]Robert A. Dahl, "On Removing Certain Impediments to Democracy in the United States", *Political Science Quarterly*, Spring, 1977.

is that normally it is at one's peril that any serious political leader can ignore their warning or refuse their encouragement and administer without consulting them. This is the era of 'administrative state', to put it in a nutshell.

Saying this does not mean that the administrators always can have their way merely because they have the records, precedents and the specialised knowledge with them coupled with an *esprit de corps*. Max Weber did not say anything like that though many would attribute this to him. Mrs. Gandhi in our country in the recent times showed how fragile this bureaucratic neutrality and fortitude can be if only proper rewards and punishments are exhibited in the show-case. The various chief ministers in many States are doing this with impunity An atmosphere of fear and nervousness pervades and this takes the shape of civil service neutrality—with a vengeance.

Administration gives a cover to governmental actions since what transpires in the dark corridors of the bureaucracy normally is not made public. While decisions of a political nature are public decisions, the deliberations in the bureaucracy are generally 'confidential' or 'secret' or 'top secret', and so on The civil servant is covered with an anonymity clause and the public have therefore no access to what transpires in their deliberations and what sort of 'note' they put up for the consideration of the political leader in the government There is also no knowing whether the note that is put up is not put up after a considerable arm twisting by the political boss on promise of reward.

Thus the administration affords a cover to the policy maker from the prying eyes of the public critic. By a sleight of hand, as it were, all political decisions are converted into administrative decisions and thus rendered invisible to the public gaze As Karl Mannheim said, the fundamental tendency of all bureaucratic thought is to turn all problems of politics into problems of administration [2] Then they get converted into management issues

Once a thing becomes administrative then the need for making it an open issue is overcome and the accessibility to the public is dependent upon the officials' whim Quite usually, information is, 'classified' thus foreclosing any attempt at public examination.

The difficulty in clogging the legitimate channels through which information has to flow normally is that it finds illegitimate channels to flow. Information is like liquids, that is, you cannot suppress it There is a Pascal's law of information! It will pass as rumour which in the long run defeats the very purpose for which information was suppressed This was very clearly witnessed during Mrs. Gandhi's emergency regime, when through the draconian press restrictions normal flow of informaton was choked and rumours did the havoc In the political system the feedback mechanism has to be well oiled so that administration can act in a way forestalling a potential danger.

[2]Karl Mannheim, *Ideology and Utopia*, 1952, p. 105.

PLEA OF SECURITY

In the name of defence or maintenance of public order, many a time administration keeps the public away from various types of information. It is not in the public interest that public should know about some of the happenings lest such knowledge should jeopardise national security or domestic peace.

It is generally agreed that certain types of defence information, both during a period of national emergency and even in normal periods cannot be divulged to the public. For example, like our Official Secrets Act of 1923 (updated to April 1974), every country has similar Acts to deal with defence secrets. As the report of the Press Law Enquiry Committee of 1948 (para 64) says:

> It is a well recognised principle that matters, which must remain secret in the interest of the state, should not be allowed to be disclosed and this limitation of the right of freedom of expression has been accepted in the United Nations Conference on Freedom of Information and the Press.

Though a cursory reading of the Official Secrets Act of 1923 as amended in 1953 would reveal that it deals with espionage and punishment for it, there is a blanket clause in section V which brings wrongful communication within the mischief of the Act. All official information can be deemed as 'wrongful' if so required by the executive, bent on punishing either the press or the individual who exposes anything that happens in government that the government itself does not reveal Thus even trivial and unimportant things can be marked secret—as one may find many circulars in the innocuous Ministry of Food and Agriculture, for instance. One can understand secrets that pertain to defence or public safety during genuine emergency. In a democracy people have a right to know and the press has a right to expose the misdeeds of the government. The professional honour of a paper is dependent on its capacity to expose secrets if such exposure is in public interest and it is the fundamental right of a citizen to know what his representatives are doing in his name. A well-informed citizenry is a guarantee against authoritarianism and corruption. As things are, what is happening in the country is that the unimaginative bureaucrat and the corrupt politician are reaping the benefits of the Act which is unchallenged by the public or the press that has been bought over. Even the parliament is kept in the dark The Official Secrets Act read together with the service conduct rules complete the circle by which any divulgence of information to the public becomes an offence punishable in the courts of law.

Nobody would deny that the safety of the country ought to get precedence over an individual's right to know what happens in the portals of the secretariats. Every piece of information, by the ingenuity of the administrative

interpretation, can become a security issue without its being even remotely connected to safety. Thus the citizen can have no access to any information except as permitted by the whim of the official concerned.

Let us see the cases of UK and the US in this regard. The first Official Secrets Act in UK was passed in 1889 which made it an offence to communicate information obtained by virtue of one's position as a civil servant. Again an Act to re-enact the Official Secret Act, 1889, with 'amendments' was passed in 1911 and another much more strict Act was passed in 1920. Though ostensibly these Acts were for the purpose of ensuring national security, in practice they were used against matters which could not be construed as espionage or violations of national security. A hangman named Pierrepoint was not permitted to publish his memoirs under threat of attracting the provisions of the Act[1] (Pakistan would for its own reasons may not permit the memoirs of Tara Masih*, or his father would not have been permitted to publish his memoirs in which Bhagat Singh would figure). As alleged by Cecil H. King, the proprietor of Daily Mirror, these Acts are used to protect the reputations of the ministers (if they have any, that is) and, above all, of civil servants. One cannot accuse a civil servant and prove the charge because of the fact that one cannot get access to the document to deny it, though one has seen it and a minister may deny its existence.

Profumo of Christene Keeler fame issued to the Sunday Pictorial which was to serialise the memoirs of Keeler, a 'D' notice through the intervention of the head of the security service which in war time was used to forbidding publication in a newspaper anything that is calculated to foment opposition to the prosecution of the war effort.

By the Public Records Acts, for instance, documents are open for scholars for study after thirty years. Even there, some documents can be excluded.

> The government and the senior members of the opposition are agreed on one thing: that the less the public knows about the process of decision-making the better. Whether this is understandable confusion of what is politically and administratively convenient with what is in the public interest may well be asked. One consequence of this, among many, is that the British citizen has less protection when decisions affecting his private rights are made than in many western countries.[3]

The words 'security' and 'public safety' are hard to define and their definition is always tilted in favour of the government which, as and when challenged, comes out with its own ingenious interpretations and in so doing not only denies the citizen his right to knowledge but covers up many an

*Tara Masih was the professional hangman who hanged Mr Bhutto and was paid Rs. 25. His father hanged Bhagat Singh.

[3]Harry Street, *Freedom, the Individual and the Law*, Penguin Books, 1967, p. 232.

illegality or immorality or irregularity of the minister or civil servant.

Contrasted to this, in the US there is an incessant war, as it were, between the public and the press on the one hand and the government on the other, for a wider dissemination of information and nothing like secrecy is generally acceptable unless certain conditions are fulfilled. We shall rapidly go through the process by which this confrontation takes place. It is interesting to see the way the press and the public in US played their part in making the government an open government.

The constitution was conceived in the US on the basis of freedom of speech, press, and assembly.

The first amendment to the constitution prohibits any law from abridging the freedom of speech or press.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech; or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievance.

This amendment is quoted because its scope was stretched and the whole edifice of the constitutional right of the people to know and the press's right to publish, was built.

From this it follows that if the people have a right to know they cannot be denied information that would enable them to participate and make the government responsibe to the public demands. It is a mandate that the government is a government of the governed and therefore the constitutional system requires that the people be adequately and honestly informed.

> If this means the government must, by and large, be conducted in a goldfish bowl, so be it, for in no other way can it retain the consent of the governed. The first amendment was conceived as a basic safeguard of the public's right to know as well as the press's right to publish. Without the first amendment—indeed the whole Bill of Rights[3] we all know our Constitution would not have been adopted.[4]

* From 1950s investigative work was going on, which resulted in 'significant amount of information vital to the discharge of. constitutional responsibilities' being released. "Twelve years of solid investigative achievement were climaxed by the enactment by Congress of the 'Freedom of Information Act' (5 U.S C. 552) which became effective on July 4, 1967. The legislation has helped to open the doors of the bureaucracy to permit greater freedom of access to non-exempt types of information in countless numbers of cases over the past four years".

Sub-committee of the Committee on Government Operations, House of Representatives, Ninety-second Congress, June 23, 24 and 25, 1971, pp. 3, 4.

[4]*Hearings* before a Sub-Committee of the Committee on Government Operations, House of Representatives, U.S., June 23, 24, 25, 1971, p. 10.

The Freedom of Information Act of 1966 (Pl 89-487) lays down that all government papers, opinions, records, policy statements and staff-manuals are to be made available upon request unless they were covered by one or more of the following nine exemptions.

1. Specifically required by the executive order to be kept secret in the interests of national defence or foreign policy.
2. Related solely to the internal personnel rules and practices of the agency.
3. Specifically exempted from disclosure by statute.
4. Trade secrets and commercial or financial information obtained from a person and privileged or confidential.
5. Inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.
6. Personnel and medical files and similar files and disclosures of which would constitute a clearly unwarranted invasion of personal privacy.
7. Investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency.
8. Contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions, or
9. Geological and geophysical information and data, including maps, concerning wells.

The 1974 Amendment to the Act refers agencies to expedite release of information, facilitates citizen's access to courts to compel disclosures, and empowers judges to determine the propriety of any exemption.

An individual can take the matter to a court if the government refuses to disclose the sought information and the burden of proving that the sought information comes within the nine exemptions will be on the government.

In spite of these express provisions, there were complaints that a good deal of foot-dragging by bureaucracy, delay, excessive fee for data, cumbersome legal remedies, lack of involvement in decision making on request for data by public information officers, etc , were being practised.

The problem of classification of documents has been, therefore, rather thorny since the basis for classification and the criteria for the different gradations like confidential, secret and top secret, and then the declassification or downgrading, have been on the anvil for quite some time A panel chaired by the Assistant Attorney General, William Rehnquist, was appointed to go into the question on classification and declassification of documents in January, 1971.

EXPOSURE OF THE PENTAGON PAPERS

As is common knowledge now, the whole issue of secrecy in government blew up with the publication of the so-called Pentagon Papers by the *New York Times* of the June 13, 1971 and serialised it on June 14 and the 15 when the Justice Department obtained a temporary court order restraining its further publication

This study was commissioned by Robert S. McNamara, now of the World Bank, then Secretary of Defence. W W Rostow, McNamara and General Westmooreland were closely connected with Vietnam misadventure during Lyndon B. Johnson's period and the Pentagon Papers were commissioned by McNamara to study the policy decisions that dragged US into the Vietnam war.

Since in the US the newspapermen act much more dynamically and independently than their counterparts in India, whose integrity was on trial during the short period of emergency, there is always an attempt to dig out more and more information and place it before the public even at great personal risk. These Papers leaked out and the *New York Times* began serialising them The first one was on the Gulf of Tonkin incident and it bore the classification 'top secret' It concerned the period 1968. As stated earlier, there was a court order restraining further serialisation.

Pentagon issued a statement on June 14 saying that it was concerned as it was a disclosure of a highly classified information affecting national security. In fact it 'violated security'.

A couple of hours before the publication on June 14, the Attorney-General John Mitchell telegraphically informed the *New York Times* not to publish the news since it would cause 'irreparable injury to the defence interests' of the US. It also attracted the provisions of the Espionage Law. (One wonders what the Indian editors would have done under the circumstances assuming that they could lay their hands on such information!)

The New York Times refused to oblige the Attorney-General saying. "It is in the interests of the people of the country to be informed of the material contained in this series of articles."

Their attorney argued before the US District Judge that the order of prohibition by the court was 'a classic case of censorship' which is forbidden by the first amendment, which guarantees freedom of the press

"A newspaper exists to publish, not to submit its publishing schedule to the US Government", argued Alexander M. Bickel, the attorney for the *Times*. In the Supreme Court six judges held in favour of the *New York Times* and three gave a dissenting verdict. William O. Douglas expressing the majority opinion said. "Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors".

The Republican Representative Paul V. McClosky said that the "issue of truthfulness in government is a problem as serious as that of ending the

war itself".

(Withholding the truth from the people cost both Profumo in England and later Nixon in US their position and prestige while withholding truth seems to be the only way to keep one's position, whatever the prestige, in India). Perhaps Lyndon B. Johnson's lament was right:

> My problem is not with the Bureaucracy with a capital B, but with a few self-satisfied bureaucrats in the Defence Department who thought they knew what was going on better than the President. I barely knew or saw them yet there they were disagreeing with my policy and leaking materials to the press[5].

Michael Harrington, an academician and Congressman gave his testimony to the aforesaid committee, which is worth quoting in this context to highlight the administrative subterfuges that enable them to convert insignificant things into matters of vital importance for national security and close it to the public.

> To put it in another way, Congress is no longer an equal partner in the American democratic process on par with the executive and the judiciary. Instead, we have become political eunuchs in matters of foreign policy and defence.
>
> Merely by classifying whatever it chooses, the administration can bar a Congressman from taking an active role in his constitutionally granted powers.
>
> The public action of the Pentagon study has been a great service, but these mistakes never should have been allowed to proliferate. History is fine but, if a mistake has been made, the discovery of that mistake 2 or 3 years later offers the country little solace. The mistakes have been made in Vietnam and they cannot be undone. But had we the benefits of all the information perhaps minds may have changed earlier. That is a speculation, but there could have been fewer deaths—both American deaths and Vietnamese deaths....[6]

In 1972 President Nixon issued an Executive Order 11652 cutting the number of departments and personnel with power to classify 'top secret' requiring the department to show why a declassification would damage the country.

The final victory for a free press and citizen was the amendment to the Freedom of Information Act of 1974 (PL 89-487) which required the federal government and its agencies to make available to citizens on request all

[5]Doris Kearns, *Lyndon Johnson and the American Dream*, New York, 1976, p. 299.
[6]Hearings, *op. cit.*, p. 227.

documents and records except those falling into certain categories which, by statute or trade or financial, personal, privacy considerations, are exempt. Court was given the power to go behind the 'classified' stamp on information sought by a citizen under the law. The Congress passed this legislation over-riding the veto exercised by President Ford.

Still there is always the lurking corner for the executive to hide itself and carry on its activities without reference to the Congress, and withholding certain type of information from the citizen. But since both the citizenry and the press are vigilant, it is hard to conceive the possibility of the executive riding roughshod over the Congress as it did climatically during the time of Nixon culminating in the Watergate episode.

All this does not mean that nefarious acts are not performed by certain agencies in the US. The CIA, the Pentagon, the FBI, are all the time involved in some act of destabilising some state or the other or obtaining information about individuals, tapping telephonic conversations, etc. The activities in Chile were brought to light in the Senate hearings under the chairmanship of Sen. Frank Church.

In 1975, the Senate Committee on Intelligence was investigating the charge of murder of Patrice Lumumba of Congo by the CIA. An officer of the agency named Bronson Tweedy was interrogated since he was the chief of the African division's agency for clandestine service. The officer, of course, suffered from amnesia and his memory had to be assisted by the production of cables he had sent to Leopoldville. Another officer admitted that he was asked by the agency to murder Lumumba. There is no accountability to anyone by either the CIA or the FBI in their secrecy of operation. It is a paradox of the western administration that while demands for greater openness in government in pursuance of an open society keep on being made, clandestine activities also keep up their pace at the same time. This is not to be cited as a defence of the senseless secrecy that shrouds administrative orders in this country. The bureaucrat in India seems to take pride in making everything look confidential and he be looked up to as the custodian of these treasures, which would prove in many cases to be just junk if exposed to public scrutiny.

CONCLUSION

on tap more than ever before and their actions have to be scrutinised by the democratic processes. This would be possible not by appeals to populistic slogan mongering but by the participation of various organisations of professional men and other intermediaries in the various levels of decision-making which is done in public, excepting in the cases of national security or communal harmony. Even in such cases judicious divulgence of information is more likely to yield positive results than a total blackout. As mentioned earlier such secrecy will only breed suspicion and rumours.

Access to public information regarding actions of public men in their public role would tone up the morality in public life, especially of those in the bureaucracy where they enjoy the fruits of anonymity. If informed citizenry is the *sine qua non* of a democracy it must be told more than what the government hands out to the effete press.

> It is less the content than the administration of security regulations that endangers public information The security officer has strong incentives to over-classify. At officers' training schools, indoctrination emphasises secrecy and not disclosure. On duty, an officer soon learns that it is safer to forestall criticism by stamping a document 'secret' than by taking the risks involved in leaving off the stamp.[7]

If public information dries up, suspicions increase, the citizens start thinking they are made victims of propaganda, and finally they cease to be participating citizens. The ill effects of such a state of affairs are experienced belatedly, but terribly To quote the U.S columnist Walter Cronkite:

> The people of a democracy must demand access for the press to their own institutions and records, and elected officials.. for they have a critical need to know. That is particularly true today, when acts and decisions of government can affect not only the welfare of millions across the country and around the world . but the welfare and options of the future as well.
>
> The democracy that permits its own elected or appointed officials to tell the people, in effect, that they have no right to know what goes on in public institutions, is a democracy flirting with disaster.[8]

□

[7]Harold D Laswek, "The Threat of the Garrison State", in Robert B. Dishman (ed), *The State of the Union*, New York, 1965, p 523

[8]Walter Cronkite, "Is the Free Press in America under Attack", *Vital Speeches of the Day*, March 15, 1979.

Official Secrets and Freedom of Information in India

M. Chalapathi Rau

DEMOCRACY, IT has been said, exposes its sores, while autocracy whitens its sepulchres. Whether under democracy or autocracy, a substratum of administrative secrecy is essential This has been so in all countries and in all conditions. There is, however, a difference: under autocracy, the administration uses secretiveness and censorship as weapons and does not allow what is known as a free press, if it does allow a press Under democracy, conditions are not ideal, unless it is an ideal democracy, but the political climate is different and the conditions of public life are liberal Freedom of expression is relatively greater Democracy too differs from country to country. The publication of the Pentagon Papers and the exposure of Watergate by *Washington Post* reporters could have been possible only in the United States.

India, following the British principle that the liberty of the journalist and the press is no greater, if no less, than that of the average citizen, based her Official Secrets Act, 1923, on the British Act of 1911, based on earlier Acts This Act does not exhaust all the usual methods of administrative secrecy, it deals only with the more serious aspects of the vital interests of the state It is generally recognised that highly secret information about vital interests of the state must not be allowed to be disclosed and this limitation on the right of freedom of speech and expression was recognised both by the United Nations Council on Freedom of Information and by the Council of Europe.

The Indian press has not claimed any right to publish information likely to be useful to the enemy in times of war or confidential government information likely to imperil public safety in times of emergency It would not, however, accept the claim that any circular or note or instruction becomes a prohibited secret because it is marked 'secret' or 'confidential' The press has claimed the right to publish confidential government information when its publication is in the public interest and the two basic limitations do not apply It is a matter of professional honour and distinction for a newspaper to expose secret moves when public interest justifies such exposure There could be no claim for protection on public grounds for such

papers as the Halleth Circular or the Puckle Letter of the days of the British Government. The press has also protested against the lack of clear and precise definition of 'official secrets' as far as it concerns publication.

The Press Laws Enquiry Committee held that the necessity of guarding state secrets was not confined to an emergency and that it was not practicable to define which confidential information should be published in the interest of the public and without prejudice to the interests of the state. The First Press Commission did not suggest any changes in the law because of the reasonable manner in which the Act had been administered, though it agreed with the contention that merely because a circular is marked secret or confidential, it should not attract the provisions of the Act, if its publication is in the interest of the public.

ADMINISTRATIVE SECRECY

This is a timid approach The need for administrative secrecy cannot be denied, but the interests of the public must be paramount in a democracy and the U.S. approach to the problem has been more positive. The basic principle is freedom of information, not administrative secrecy, public interest and not the passing whims of a party administration. Where the government, usually belonging to a party, can be distinguished from the administration, it has a right to preserve some vital secrets, not what it considers to be secrets but what public opinion and the supreme legislature of the nation consider to be secret.

For instance, cabinet proceedings and decisions belong to a distinct category. In West Germany, in spite of the hangover of the way Hitler perverted the Weimar constitution, freedom of information has been reserved with sanctity in the constitution of the new Federal Republic. It has been so also in other continental countries. This is the modern trend in most modern countries.

In India, the operative section of the Official Secrets Act is based on Section 2 of the British Act, which is considered out of date. It was passed against the background of fears of German espionage None of the sections of this Act was subjected to detailed discussion or scrutiny. There have been reconsiderations and moves for liberalisation on the basis of the Franks and other reports The Indian Act stands where it was. It would be unfair to keep it as it is when the British Act is sought to be revised and when it is known that, while British statutes have been copied, British practice has not been. An open government means the public's right to information, and there is a rising demand for openness of government, which means that ministers and civil servants should accept as a matter of course that they must give full reasons for their decisions and must provide all relevant information about policies and proposals.

FREEDOM OF INFORMATION ACT

It is in the United States more than in any other country that openness of government is accepted at least in theory. The basis of the Freedom of Information Act, 1966, is that a democracy works best when the people have all the information that the security of the nation permits and that there should be no secrecy around decisions which can be revealed without injury to the public interest.

The citizen's view of the U S Government has been summarised as : The people to a far greater extent than their leaders regard government secrecy as a prime obstacle to responsiveness. But both agree that openness and honesty in officials are a prerequisite to successful contacts between the leaders and the led.

Justices Stewart and White wrote in the Pentagon Papers case: It is elementary that the successful conduct of international diplomacy and maintenance of an effective national defence require both confidentiality and secrecy. Other nations can hardly deal with this nation in an atmosphere of mutual trust unless they can be assured that their confidence will be kept.

PRIVACY OR PUBLIC DISCOURSE

In the words of a constitutional authority on the disorderly relationship between media and government: If we ordered it, we would have to sacrifice one of two contending values, privacy or public discourse, which are ultimately irreconcilable. It is the content that serves the interest of society as a whole.

The authors of the Freedom of Information Act clearly recognised that much foreign policy information which genuinely requires protection for a time in the public interest is not susceptible of precise definition In enacting the law, the Congress left it to the chief executive, as the official primarily responsible for the day-to-day conduct of foreign affairs, to determine by executive order what matters are 'specifically required .. . to be kept secret in the interest of the national defence or foreign policy.'

The three classification categories were defined as extending to those matters whose unauthorised disclosure 'could reasonably be expected to cause exceptionally grave damage' (top secret), 'serious damage' (secret) or 'damage to national security' (confidential) Since then there have been guidelines, declassification programmes, an effort at an effective information system and reform about policy and procedures An effort has been made also to substitute a single definition, secret defence data, for the three existing classification categories Congressional oversight has been always favoured.

The right of access to, inspection of, or copying of public records appears to depend largely on the provisions of a particular statute but there is no

general rule about public records and there are exceptions. There are secret or privileged matters. Mandamus is an appropriate remedy to enforce a right to inspect and copy public records. The Freedom of Information Act was passed to eliminate much of the vagueness of the old law and to strengthen its disclosure requirements Its purpose was to provide a true federal public records statute by requiring the availability, to any member of the public, of all the executive branch records described in its requirements except those within some stated exemptions. The Act makes disclosure the general rule and permits only information specifically exempted to be withheld. Disclosure requirements are to be construed broadly, exemptions narrowly.

CENSORSHIP

There were earlier cases of censorship, passive or active. Alexander the Great invented postal censorship for his troops in the fourth century B.C. By his present name the censor dates back to ancient Rome. The two-men office of censorship was created in 443 B.C , entrusted with the responsibility of presiding over the census, involving not only the registration of citizens but an estimate of the duties each individual owed to the state. The scope of the office increased considerably in course of time, the censors determined the composition of the Roman Senate and propounded the moral code by which the population should abide In Europe the idea of censorship was firmly established by the end of the Middle Ages. In the English-speaking world the first resounding blow against censorship was struck by Milton in his *Areopagitica* The United States had her bill of rights only after the American Revolution In the two world wars, the democratic world had to accept censorship. To the hangover of the two world wars, India had to add the imposition of foreign autocratic rule

After independence, India had to fight some defensive wars, and the Defence of India Rules were at work After the Chinese attack of 1962 and the failures of the Indian military machine, the Henderson Brooke report was kept a great secret, and in spite of a trickle of military memoirs, the failures have not been sufficiently discussed Censorship laws, while obviously meant for protection of military secrets, have a way of slipping over into the field of opinion. 'Information of value to the enemy' is an elastic phrase. A democracy may need more criticism in a time of war than in normal times. The 'shell scandal' in the World War I, thanks to the enterprise of war correspondents like Col Repington, saved England from near defeat. Even military secrets can be predicted by voluntary agreement more than by censorship laws But voluntary censorship also may be unworkable Public relations and propaganda may help, but a way out is a kind of mutuality between the government and the press.

The emergency was a great strain not only on freedom of the press but on the relations between the government and the press. Large areas of the

press were needlessly suspect and treated as hostile The cooperation of only the flattering and servile part of the press was sought. To the vagaries of censorship were added the vagaries of ministerial and departmental leadership. The remedies against this kind of situation are under the consideration of the Second Press Commission

Without a war or an emergency, the conflict between the administration and public interest, or in its most vociferous form, the press, does not cease to exist But it need not be a constant war, if the two sides understand their respective roles in a democratic set-up. The public official does not share, like the press, intimate experience of the public's mood. The press is publicity and lives in the now hackneyed phrase by disclosures. It is not necessary for it to share the government's responsibilities in a narrow sense, it has its own responsibilities to the public. The public official has to work within a carefully marked preserve; he spurns or should spurn publicity The same aim of good government and the differences in technique produces conflicts, but these are not rival but complementary processes

It is necessary for the administration to understand and accept that, apart from freedom of speech and expression, a free press is a prerequisite in a democratic set-up Government is by debate The administration has to be carried on in the full glare of publicity The bureaucracy can afford and is expected to be responsive to criticism. The public official must be in the mood to understand the needs of democracy, the need for information, the need for public discussion, the need for the searchlight of publicity. In these days when governments seem to derive support for their arbitrariness direct from the people, they cannot object to the press deriving support from the same source and performing its functions without regard for the feelings of the rules The press may not be what it should be, but till it undergoes transformation, it cannot abdicate its functions The present unsatisfactory state of public relations in this country has not helped to lessen the irritability of government or the peevishness of some sections of the press. As a part of the administration, government information services can be more effective in case they understand the role of the press, which includes access to alternative sources of information It is possible to check and recheck information from parallel sources The need is for more and more information. Few press conferences unfortunately serve this purpose The importance of communicativeness lies not in submitting to unnecessary or unwholesome prodding but in accepting the democratic need for correct information.

The right of fair comment has not been sufficiently understood by the public official and limits to it have not been understood by the press. The public official is entitled to fair play but not more than that In Kelly *vs* Sherlock (1866), it was declared.

> A clergyman with his flock, an admiral with his fleet, a general with his army and a judge with his jury are all subjects of public discussion.

> Whoever fills public position renders himself open thereto. He must accept it as a necessary, though unpleasant, appendage to his office.

Lord Chief Justice Cockburn, in an earlier judgement in the case of Seymour V. Butterworth (1962), had said:

> Those who fill a public position must not be too thin skinned in reference to comments made upon them. It would often happen that observations would be made upon publicmen, which they knew from the bottom of their hearts were undeserved and unjust; yet they must bear them and submit to be misunderstood for a time because all knew that this criticism of the press was the best certainty for the proper discharge of public duties.

India cannot lag behind other democratic countries. This is no time to think of official secrets, ill-defined and arbitrarily enforced. It is time to think of a positive approach according to needs of freedom of information and accept the concept of open government with access for the public and the press to all kinds of information, including files, records and other documents.



Open Government

No statute or simple set of decisions will alter generations of received tradition. The new tradition of open government will emerge only through the practice of open government itself. The adjustment of the political sub-culture of the Public Service will inevitably be gradual. The very questioning of every example of secrecy is the essential beginning of such a process of change. The cumulative experience of ministers accepting the irrelevance of traditional concepts of responsibility; the exercise by public servants of whatever rights to freedom of speech may be recognised; the continual pressure parliamentary review of official secrecy; the use that may be made of whatever rights of access to information that may be created; the cumulative impact of the release of information which has traditionally been withheld; the effect on the public service of more rigid procedural requirements for classification—it is through processes such as these that a new tradition of open government will emerge.

—J.J. SPIGELMAN,
Secrecy: Political and Censorship in Australia,
1973

Secrecy in Government in India

Shriram Maheshwari

ALL GOVERNMENTS have been practising studied concealment of information from the people, although the degree, extent and nature of such reticence would necessarily vary both synchronically and diachronically Yet it is only recently that a demand for openness in the system of governance has been made. What is more, this agitation has acquired an almost international dimension, sweeping across all the democratic countries of the world. The Vietnamese 'escalation' and the various startling disclosures about it created a valid distrust of the government which was only reinforced by the exposure of various scandals involving personalities holding or wielding political power. The debate, understandably, started in the West, and India could not remain completely untouched. But India has had its own reasons for feeling concerned over secrecy in government. The country knows too well—and too bitterly—that only recently the political executive of the land was indulging in the most reprehensible behaviour, all this rendered possible by its habit of not letting the people know about its doings The Shah Commission of Inquiry (1977-78) has rightly cautioned.

> It has been established that more the effort at secrecy the greater the chances of abuse of authority by the functionaries [1]

HISTORY OF SECRECY IN INDIA

Secrecy by Persuasion

Secrecy in Indian Government has indeed a long history—longer than in many other countries As early as August 30, 1843 the Central Government in India issued a notification asking its personnel not to communicate to the outside world any paper or information in their possession What was happening at the time was that some civil servants were supplying information on matters relating to government to the press, which had begun

[1] *Report of the Shah Commission of Inquiry*, Third and Final Report, New Delhi, Controller of Publications, Government of India, 1978, p. 231

emerging in India around this time—a practice causing occasional embarrassment to the Government. It was precisely this indulgence which was sought to be curbed by this notification, which read:

> Some misconception appearing to exist with respect to the power which officers of both services (*i e.*, civil and military) have over the documents and papers which come into their possession officially, the Governor General in Council deems it expedient to notify that such documents and papers are in no case to be made public, or communicated to individuals, without the previous consent of the government to which alone they belong.[2]

Four years later, the Government of India felt compelled to reissue the earlier notification as the practice of purveying governmental information to the press and to others had not only not subsided but had in the meantime become more widespread. Some civil servants were even closely connected with the press in India.

In July 1875 the Central Government laid down detailed instructions in a bid to regulate the contemporary administrative behaviour in relation to the emerging press in India [3]

Under these rules, no public functionary was permitted, without the previous sanction in writing of the government under which he immediately served, to become the proprietor, either in whole or in part, of any newspaper or periodical. It was laid down that such sanction was to be given in the case of newspapers or publications mainly devoted to the discussion of topics not of a political character, but such, for instance, as art, science, or literature. The sanction, moreover, was liable to be withdrawn at the discretion of the government.

Secondly, public personnel were not absolutely prohibited from contributing to the press; but the government wanted them to confine themselves within the limits of temperate and reasonable discussion. They, moreover, were prohibited from making public, without the previous sanction of the government, any documents, papers, or information of which they might have become possessed in their official capacity.

Thirdly, it was the government that decided, that in case of doubt, whether any engagement of civil servants with the press was consistent with the discharge of their duties to their employer.

These orders were widely circulated in 1875, but the leakage of happening within the bureaucracy did not completely stop. This indeed became a cause of concern for the government. As the business that began to pass through the

[2]Government of India, Home Department, Public Proceedings, August 1884, Nos 213-220

[3]Government of India, Home Department, Public Proceedings, August 1884, Nos. D 213-220.

public offices became more important subsequently the government felt compelled in December 1878

> to remind all officers of the government that information received by them in their official capacity, whether from official sources or otherwise, which is not from its nature obviously intended to be made public, cannot be treated as if it were at their personal disposal.[4]

Yet the new resolution did not depart from the basic pattern of the earlier notifications. The Resolution of 1878 did not entirely prohibit the disclosure, without special authority, of any information received officially. The government still preferred to trust the discretion and intelligence of the public functionaries holding places of trust.

> But His Excellency would impress upon all officers the serious responsibility involved in the exercise of this discretion. Whenever there is any room for doubt as to the right course to pursue, the orders of superior authority should be obtained before information regarding the public affairs is communicated to any one not officially entitled to receive it [5]

There was yet another change effected in the seventies. For civil servants there was introduced a special clause in their covenants binding them not to divulge official secrets [6]

So long, secrecy in government was an internal affair of the government of India In 1884 the Secretary of State for India[7] took up the case for secrecy, and wrote to India to initiate appropriate action in this direction He enclosed a copy of the Treasury Minute of 13 March 1884 regarding the 'premature publication of official documents' and wanted India to adopt similar rules The Treasury Minute reminded that

> the communications against which these cautions are directed are not confined to matter still under discussion, but include also the unauthorised disclosure of matter finally decided on, but as to which the manner and

[4]Government of India, Home Department, Public Proceedings, January 1879, Nos 95-96

[5]Government of India, Home Department, Public Proceedings, January 1879, Nos. 95-96.

[6]*Ibid*

[7]In Britain the press had by this time emerged as the fourth estate and there were some civil servants who were in the habit of communicating governmental information to the press. To check this practice the Treasury issued a circular in June 1873 warning that 'such breaches of official confidence are offences of the very gravest character which a public officer can commit' and cautioned that those who indulged in such practices were to be visited with extreme penalty (Government of India, Home Department. Public Proceedings, August 1884, No. 214)

> the time of publication may be not less important than the matter itself. An irregularity of this latter kind would be the unauthorised communications to the public press of an official document presented, or about to be presented to Parliament, but not yet actually circulated.[8]

The government fell in line with the Secretary of State for India's views, and on 16 August 1884 issued a circular to this effect.

To sum up, the existing arrangements prohibited making public, without the previous sanction of government, of any documents, papers or information acquired in an official capacity. Any information received in an official capacity, whether from official sources or *otherwise*, not from its nature obviously intended to be made public, could not be treated as if at the personal disposal of the recipient. Furthermore, public personnel were charged to use discretion and intelligence in disclosing information received officially, and, in cases of doubt, to apply to the higher authority.

The weaknesses of these orders and the official circular of 1884 began to be realised in the next few years. These rules applied to the formal direct and avowed communication to the press and public official information. None of these orders, for instance, prohibited "the mischief of unguarded oral discussion of pending questions of importance, in the course of which items of information not designed for publication are allowed to get out."[9] This had to be plugged, and this was done through a resolution issued on 3 June 1885. This Resolution is important for two reasons. First, it consolidated all the earlier orders and circulars on the subject and thus became a document which was at once most comprehensive as well as authentic on secrecy in government. Secondly, it was itself marked 'confidential', and was specially forbidden publication in the gazette. This sets it apart from the earlier orders which were all published in the gazette.

The introduction in 1853 of telegraphic communication in India had the effect of shattering the country's isolation. Hitherto, the newspapers published in India were neither numerous nor widely circulated. Now, every statement, however inaccurate or incomplete, could be reported from one end of India to the other and from India to Europe in the course of a few hours. Journalists as a class are always interested in scraps of official gossip about men and matters under discussion in the bureaucracy, for all these make juicy stories for the papers. In India, moreover, public administration was the only institution capable of providing the press with the daily pabulum requisite for the nourishment of its enterprise and maintenance of its character. The journalistic pressure on the government was thus immense, which, in the latter's eyes, needed to be regulated. This it sought to do by the Resolution

[8]Government of India, Home Department, Public Proceedings, August 1884, No 214

[9]Government of India, Home Department, Public Proceedings, June 1885, No. 162.

of 1885. The Resolution said:

> No officer of Government not specially authorised in that behalf, is at liberty to communicate to the press, either directly or indirectly, information of which he may become possessed in the course of his official duty. A similar professional reticence should be exercised by all officers of Government in their private and unofficial intercourse with non-official persons, and even with officers of Government belonging to other Departments.. . When an officer has in the course of his duty become possessed of special information not yet made public, he should always be strictly on his guard against the temptation of divulging it, even to other servants of Government, when these are not officially entitled to his confidence.... Officers of Government are bound to be as reserved in respect to all matters that may come within their cognizance during the discharge of their public duties as lawyers, bankers or other professional men in regard to the affairs of their clients.[10]

While promoting secrecy, the government was also in a way alive to its responsibility for flow of what it considered as legitimate information to outsiders, especially to the press. It made departmental arrangements for communicating to the press such information as might unobjectionably be given. The government had appointed in 1877 a press commissioner to liaison with the press and through whom official papers or information of value were given. Lethbridge was the first press commissioner in India.

SECRECY BY STATUTE

It must also be noted that hitherto the disclosure of the confidential information of government to unauthorised persons was punishable under the disciplinary rules, but it was not a penal offence as such. It attracted penal punishment since 1889 when the Indian Official Secrets Act was passed.

Official Secrets Act, 1889

Britain passed its first Official Secrets Act in 1889, and a unique feature of this statute was that it was applicable to 'any part of Her Majesty's dominions' including India. This flowed from the overriding British belief that secrets were imperial in nature and thus the statute enforcing it must be applicable to the empire. Section 5 of the English Official Secrets Act, however, provided:

> If by any law made before or after the passing of this Act by the legislature of any British possession provisions are made which appear to Her

[10]Government of India, Home Department (Public), Resolution No 22A, dated 3 June 1885.

> Majesty the Queen to be of the like effect as those contained in this Act, Her Majesty may, by Order in Council, suspend the operation within such British possession of this Act, or of any part thereof, so long as such law continues in force there, and no longer, and such order shall have effect as if it were enacted in this Act.

In other words, the (British) Official Secrets Act, 1889 gave an option to India: 'You take this Act, or you frame a similar Act'. The English statute was already in force in India, but it was thought desirable to place it also on the Indian statute book in order to give it greater publicity and, secondly, —even more importantly—to bring its provisions into complete harmony with India's own system of jurisprudence and administration. In other words, the English statute was re-enacted for India with such adaptations of its language and penalties as the nomenclature of the Indian statute book required.

The Indian Official Secrets Act was thus passed in 1889. It was a brief one consisting of only five sections. But it covered a much wider area than the Resolution of 1885, and was directed against espionage as well as against any person to whom an official information 'ought not, in the interest of the state, to be communicated at that time', its overriding objective being 'to prevent the disclosure of official documents and information'. An act of espionage was punishable with transportation for life or for any term not less than five years or with imprisonment for a term upto two years. Other disclosures were made punishable with imprisonment for a term upto one year, or with fine, or with both. The offences covered by it were: (1) the wrongful obtaining of information in regard to any matter of state importance, and (2) the wrongful communication of such information.

The Indian Official Secrets Act, 1889 was amended in 1904, and as a result, it became a devastatingly severe piece of legislation Indeed, the amendment was so harsh that it was described as an attempt to 'Russionize the Indian administration'. In the place of the provision that a person, who entered an office for the purpose of wrongfully obtaining information, was liable to be punished under the Act, it was enacted that whoever, 'without lawful authority or permission (the proof whereof shall be upon him)', went to an office, committed an offence under the Act Secondly, the amendment made all offences under the Act cognisable and non-bailable. The draconian nature of the amendment was thus plain. This was the time when India was touching new levels of political awakening and the emerging 'seditiousness' in the country provided the justification in the eyes of Lord Curzon to think of firmer measures for official security. Around this time, upholding of secrecy in official work was incorporated in the Government Servants Conduct Rules as well Rule 17 said:

> A government servant may not, unless generally empowered by the local government in this behalf, communicate directly or indirectly to

government servants belonging to other departments, or to non-official persons, or the press, any document or information which has come into his possession in the course of his public duties, or has been prepared or collected by him in the course of those duties, whether from official sources or otherwise.

Official Secrets Act, 1923

In 1911 Britain replaced its Official Secrets Act, 1889 by the Official Secrets Act of 1911. As with its predecessor, the Act of 1911 was automatically applicable to India unless India enacted a similar legislation for itself. This was a period of political uncertainty, even expectancy for India, and it was felt that this country stood on the threshold of a new political career The Government of India, therefore, decided not to follow on the footsteps of Britain immediately but to wait till such time as the political picture became clearer. The Government of India Act, 1919 laid down the new framework of governance for the country and it was only after this constitution was put into operation that the task of updating the arrangements regarding official secrecy was taken in hand. The Official Secrets Act, 1923 assimilated the relevant law in India to the law in Britain.

Until the passage of the 1923 Act, the law relating to secrecy in India, it may be recalled, was contained in the Official Secrets Act 1889, as amended by the Act of 1904 as well as in the Official Secrets Act, 1911 of Britain. This, to be sure, was an inconvenient arrangement and pointed the need for consolidation. The inconvenience was further accentuated when the British Act of 1911 was amended by the Official Secrets Act of 1920—primarily to incorporate the experience gained during the First World War

The Official Secrets Bill, 1923 was submitted to a select committee of the (Central) Legislative Assembly which reported back in February 1923. The Bill was discussed in the Assembly on 14 and 24 February 1923 and was passed.

The Official Secrets Act, 1923 makes provisions against two sets of events It is, first, directed against espionage and in this respect has left nothing to chance. The provisions covering espionage are made extremely favourable to the state, and an individual can be punished even on faint evidence. For instance, the Act says that it shall not be necessary to show that the accused person was guilty of any particular act prejudicial to the safety or interests of the state, he may be convicted if, from the circumstances of the case or his conduct or his known character as proved, it appeared that his purpose was prejudicial to the safety or interests of the state. What is more, the Act says that a person may be presumed to have been in communication with a foreign agent if he has, either within or without (India), visited the address of a foreign agent or either within or without India, the name or address of, or any other information regarding, a foreign agent has been found in his possession.

The present paper does not concern itself very much with this provision.

The second set of events covered by the Act relates to communication of official information to outsiders. The Act makes it a penal offence for any person holding office under the government wilfully to communicate any official information to any person, other than a person to whom he is authorised to communicate it. What is more, it is equally an offence for any person to receive such information. In other words, the statute sets out to punish both the 'thief' and the 'receiver of the stolen goods'! This is contained in section 5 of the Official Secrets Act, 1923, which is an exact replica of section 2 of the British Official Secrets Act.

Section 5 of the Official Secrets Act, 1923 is a catch all, and there is hardly anything which can escape its staggering provisions. It has been said that over 2,000 differently worded charges can be framed under it ! Secondly, this section covers all that happens within the government; all information which a civil servant happens to learn in the course of his duty is official, and is thus covered under it. This section leaves nothing, and nothing escapes it. Thirdly, the Act makes a mere receipt of official information an offence. The fact that the information might have been communicated to a person contrary to his desire is irrelevant and does not immunise him even in the least! Fourthly, section 5 relates not only to a civil servant but to other persons also. It categorises four situations in which other persons may also be caught:

1. Government contractors and their employees. The information that they learn in their capacity is 'official' for purposes of this section of the Act
2. Any person to whom official information is entrusted in confidence by a civil servant.
3. Any person in possession of official information which has been made or obtained in contravention of the Official Secrets Act.
4 Any person coming into possession, by whatever means, of a secret official code word or pass word, or of information about a defence establishment or other prohibited place.

Though palimpsest of the British statute, the Indian Official Secrets Act, 1923 is much more severe in its application, in the sense that while in Britain only the Attorney General is empowered to initiate a prosecution for violation of the Act, in India this power vests with the executive. Nor was the Act to remain in disuse for long. Soon after it was passed there was a case of a civil servant communicating to unauthorised private persons on matters coming to his cognisance in his official capacity and action was taken against him.[11]

[11]Government of India, Home Department (Public), File 426 of 1923.

The catchment area of the Act is thus menacingly stupendous, capable as it is of apparently unlimited expansion Hari Singh Gour rightly pleaded when he spoke in the Legislative Assembly:

> There is another fact, Sir, upon which I invite the attention of the Government relating to civil offences. Your provisions are so wide that you will have no difficulty whatever in running in any body who peeps into an office for the purpose of making some, it may be entirely innocent, enquiry as to when there is going to be the next meeting of the Assembly, or whether a certain report on the census of India has come out and what is the population of India recorded in that period. I hope, Sir, that you will work the civil side of it in a spirit of charity and that you will not use these provisions in a manner calculated to abridge and thwart popular liberties [12]

Secrecy having acquired sanctity from the statute of 1889 there was soon taken up an administrative exercise to dress it up with elaborate details 'Memorandum of Instructions regarding the Treatment of Secret and Confidential Papers' issued on 11 July 1917 points out:

> The. .instructions (in respect of not divulging official information) apply generally to all documents and information in the possession of Government. Documents (including letters or other communications, official or demi-official, maps, books, pamphlets, etc.) which require additional precautions to prevent the disclosure of their contents, may be classed and marked as 'secret' or 'confidential', and should then be treated in the manner explained in the two following paragraphs.
>
> The contents of papers marked 'confidential'.. should be disclosed only to authorised persons or in the interests of the public service. They should not pass in the ordinary course through an office, but be dealt with only by the head of the office, and if necessary, certain trustworthy assistants, who should be specially authorised, for that purpose If not passed by hand from one authorised person to another they should be sent in a sealed cover, or, as the practice is in some secretariat offices, in boxes provided with special locks. They should not be brought into ordinary proceedings, but should be separately recorded, and kept in the custody of an officer who is authorised to deal with them. If printed, the spare copies and the proceedings volumes should be treated with the same attention as the originals. As few copies of confidential papers as possible should be printed and a register should be kept of these showing how each copy has been disposed of.

[12] *The Legislative Assembly Debates*, Vol III, Part IV, 21 February 1923 to 14 March 1923, p 2784

> Papers marked 'secret' are intended only for the personal information of the Government or individual to whom they are issued and of those officers whose duties they affect. The officer to whom they are addressed is personally responsible that they are kept in safe custody and that their contents are disclosed to the officers mentioned above and to those only. They should be kept in the personal custody of the officer to whom they are issued, except in the case of Government secretariats, in which special arrangements may be made for their safe custody. When not in actual use they should be kept securely locked up in a receptacle of which the key or keys are not accessible to any body except the officer responsible for them, and when in use care should be taken that access to them is not obtained by any unauthorized persons. A list of such papers should be kept by the officer responsible for them (or in the case of government secretariats under his orders) and, when relieved in his appointment, he will hand over both the list and the papers to his successor from whom a receipt or a charge certificate be taken.
>
> When sent by post confidential or secret papers should be enclosed in double covers of which the inner one should be marked 'confidential' or 'secret' and superscribed with only the name of the officer by whom it is to be opened. The outer cover should bear the usual official address. Letters or packets containing confidential or secret papers sent by post should invariably be registered, and those containing secret papers should also be sent 'acknowledgement due [13]

The foregoing excerpt, undoubtedly long and focussing on the mechanics of secrecy management, should enable a reader to peep into the minds of those charged with the responsibility of securing compliance with the Official Secrets Act. The detailed and copious nature of the instructions points out the gradual transformation of secrecy into a kind of 'secretism' in official India No less impressive was secrecy's progeny; it includes 'top secret', 'secret', 'confidential', and 'for official use only', each having its own elaborate rituals.

All this could be understood if one was aware of the contemporary ecology of Indian public administration. The nationalist movement was striking deeper roots in the country and there were also the extremist and terrorist forces at work. The colonial administration was naturally too anxious not only to keep itself insulated from the people at large but also to instal and maintain a sprawling network of checks and counter checks within the administrative system too The then ecology induced the rulers to view utmost secrecy as but an integral part of colonial survival.

[13]Government of India, Home Department, Public-A, Proceedings, July 1917, Nos 206-207, p 24

INDEPENDENCE AND OFFICIAL SECRETS ACT

A colonial government had thus reasons to be afraid of the people and deny them access to official information Indeed, maximum secrecy in the performance of its operations is among the attributes, no less than prerequisites, of colonialism. It was, therefore, hoped that the theory and practice of secrecy would undergo a change with the ringing out of the old order and the ringing in of independence. This, regrettably, has not happened.

It is over thirty years since India acquired statehood but the country has preferred to continue the Official Secrets Act of 1923 on the statute book making it applicable to both the Central and the State Governments There were, to be sure, some amendments, primarily to make terminological changes necessary to bring it in accord with the terminology of the Constitution but its basic structure and spirit remain intact

The Official Secrets Act, 1923 was last amended in 1967 primarily "to make most of the offences punishable with greater sentences of imprisonment and make most of the offences. . cognisable offences'[14] The Minister of State in the Ministry of Home Affairs elaborated:

> I will only remind him (reference is to a Member of Parliament) of the case of Amir Hussain who was prosecuted under this Act in 1963 for passing on some information—he was a Pak national—to Pakistan When he was prosecuted under this Act, since under the provisions of this Act it was bailable, he was released on bail He jumped the bail, crossed over to Pakistan and we lost that case completely, because he was not traceable after that I give this case only to illustrate the necessity why the provisions of this clause must be made non-bailable so that we do not take the risk in the matter of agents of foreign countries or enemies of India and allow them to escape the clutches of law like this.[15]

The Bill was passed in one sitting not taking even full two hours. While parliament was vividly alive to the dangers of spying it showed no awareness, much less understanding, of the wider implications involved in keeping governmental operations under a thick cloak of secrecy unwittingly, Parliament opted for a role destined to keep it poorly informed and therefore weak in its relationship with the executive.

The Official Secrets Act has thus kept the people in the dark about what has been happening within the government It was the catch all provisions of this statute which encouraged the political leadership to pursue courses of action highly detrimental to public morality. The country's leadership could commit with impunity all kinds of wrong, and the device that came handy was to keep

[14]*Lok Sabha Debates*, Fourth Series, Vol. VIII, No 62, August 12, 1967, Col 19283.
[15]*Ibid*, col. 19299.

the affairs secret from the outside world. Since the mid-sixties, particularly since the early seventies, there began to take place 'scandals', but these were prevented from coming to full light by concealing information about them from the people. If the government were more open, the scandals would not have been possible, and the nightmare of the internal emergency would have perhaps been avoided.

It was against such a setting that the election of 1977 was fought.

The Janata Party made a special mention of promoting 'openness' in government in its manifesto of 1977.[16] By way of fulfilling this commitment, the then Home Minister, Charan Singh, constituted in 1977 a working group comprising officials from the Cabinet Secretariat, the Ministry of Home Affairs and the Ministries of Finance and Defence to find out if the Official Secrets Act, framed in 1923, could be modified so as to enable greater dissemination of information to the public. The working group laboured for months to reiterate the soundness of retaining without change or abridgement the statute of 1923. It argued that there was nothing in the Official Secrets Act, 1923 which stood in the way of flow of necessary information to the public. The very composition of the working group ordained the kind of verdict which ultimately emanated from it. Secrecy is a well-known device which bureaucracy presses into service to strengthen its power position and to minimise criticism of its action. Bureaucracy revels in secrecy. The 'no change' recommendation made by the working group serves only to confirm that ancient truth.[17] Indeed, any other kind of recommendation would have been a surprise.

[16]The manifesto said: "The Janata Party promises an open government in a free society and will not misuse the intelligence services and governmental authority for personal and partisan ends It will open and sustain a dialogue with the people at all levels and on all issues." [Shakdher, S L. (ed), *The Sixth General Election to Lok Sabha*, New Delhi, Lok Sabha Secretariat, 1977, pp. 44-5]

[17]It may be interesting to note the views of Max Weber (1864-1920) on secrecy. He observes. "Every bureaucracy seeks to increase the superiority of the professionally informed by keeping their knowledge and intentions secret. Bureaucratic administration always tends to be an administration of 'secret sessions'. in so far as it can, it hides its knowledge and action from criticism The treasury officials of the Persian Shah have made a secret doctrine of their budgetary art and even use secret script The official statistics of Prussia, in general, make public only what cannot do any harm to the intentions of the power-wielding bureaucracy. The tendency towards secrecy in certain administrative fields follows their material nature everywhere that the power interests of the domination structure towards *the outside* are at stake, whether it is an economic competitor of a private enterprise, or a foreign, potentially hostile polity, we find secrecy The pure interest of the bureaucracy in power, however, is efficacious far beyond those areas where purely functional interests make for secrecy. The concept of the 'official secret' is the specific invention of bureaucracy, and nothing is so fanatically defended by the bureaucracy as this attitude, which cannot be substantially justified beyond these specifically qualified areas In facing a parliament, the bureaucracy, out of a sure power instinct, fights every attempt of the parliament to gain knowledge by means of its own experts or from interest groups. The so-called right of

(*Continued on next page*)

Yet, India was expecting some loosening of secrecy in government, largely because of the 1977 Janata pledge and partly also because of the fact that wind everywhere was blowing in favour of openness in government. On 30 August, 1978 Jyotirmoy Bosu stood up in the Lok Sabha to ask:

Will the Minister of Home Affairs be pleased to state:

(*a*) Whether his Ministry is aware of the fact that the British Official Secrets Act, which we follow here, is being amended allowing a right to the people to having access to all official documents other than the highly sensitive genuine ones dealing with the national security on the lines it is in existence in the Scandinavian countries;
(*b*) even after Independence what is the reason for India to follow the outdated British pattern Act;
(*c*) whether the Ministry would bring an Act to guarantee access to all official documents other than the highly sensitve genuine ones dealing with national security;
(*d*) if so, details there of; and
(*e*) if not, reason there of.

The question was handled by the Minister of State in the Ministry of Home Affairs who observed:

(*a*) The Government have seen press reports to the effect that the government of United Kingdom have brought out a White Paper indicating the likelihood of amendments to their Official Secrets Act The exact scope of the likely amendments is not known.
(*b*) The Official Secrets Act, 1923 has been amended from time to time to meet our requirements
(*c*) to (e) The provisions of the Official Secrets Act 1923 are designed primarily to safeguard national security and not to prohibit legitimate access to official documents and, therefore, no legislation to guarantee access to official documents, other than those dealing with national security, is considered necessary.[18]

The country is thus back to 1923—to 'square one'—and is content to regulate its communication system with 'we, the people of India' along the

(*Continued from previous page*)
parliamentary investigation is one of the means by which parliament seeks such knowledge Bureaucracy naturally welcomes a poorly informed and hence a powerless parliament at least in so far as ignorance somehow agrees with the bureaucracy's interests". [Gerth, H H and Mills, C Wright (Trans), *From Max Weber Essays in Sociology*, London, Routledge and Kegan Paul, 1948, pp 233-4]

[18]*Lok Sabha Debates*, Sixth Series, Vol. XVIII, No 32, 30 August 1978, Cols 294-5

network of the colonial Official Secrets Act of 1923.

CRITIQUE OF SECRECY REGULATIONS IN INDIA

Today, blanket secrecy pervades every nook and cranny of public administration in India, and there is, moreover, an apparent mindlessness in the manner of its application. The several reports on administrative and social issues continue to be treated as confidential long after they are submitted and thus are not made available to the citizen. This only prevents a public debate on the system of public administration appropriate for the country.

One also notices a marked degree of selectivity, or an absence of uniformity, in the application of the Official Secrets Act, and this in its turn defeats the principle of equity, a true hallmark of administrative ethics. Civil servants are occasionally seen in practice to bend the law and adopt a somewhat flexible attitude, the sharing of official information generally depending upon the personal equation between the civil servant and the recipient Besides, it is rather widely believed that the Official Secrets Act is made to lie low particularly when western scholars approach for information.[19] Also it is alleged that information which has economic or commercial value is often leaked out to the more unscrupulous businessmen, thanks to the 'carrots' which they are in a position to dangle before the civil servants. Even otherwise, the phenomenon of missing files in government offices is none too unconspicuous, and this only indicates a general lack of professional seriousness on the part of the bureaucracy to observe the law. These apart, some civil servants apparently violate the secrecy regulations by surreptiously having an extra copy made of relevant official papers with which they deal, and keeping it with them; this official information they later utilise for writing articles and books.

The present paper does not purport to suggest a complete abolition of the Official Secrets Act So long as national sovereignties exist and national flags fly, a measure of secrecy in government must be considered to be legitimate. Besides, information on matters constituting what is called privacy and personal life of citizens must not be publicly paraded or even shared with other collateral agencies In short, both national sovereignty and civilisation point to the continued need for a measure of secrecy in government. Matters relating to national security and defence, internal law and order,

[19]See, for instance, the following observation made by Girja Kumar, "Paradoxically enough, Phillips Talbot, the present (*i e.*, in 1968) American Ambassador to Greece and former Assistant Secretary to State in the Department of State was given access to secret official documents for the completion of his doctoral dissertation on India-Pakistan relations submitted to the University of Chicago several years ago The following entry contained in a bibliographical publication may be of some interest to all of us '2074 Talbot, Phillips, *Aspects of India-Pakistan Relations*, 1947-52 (Secret Research), 1955' (Stucki, Curtis W, *American Doctoral Dissertations on Asia*, 1963, p 146)" (Girja Kumar, "Servitude of the Mind", *The Seminar*, No 112, December 1968, p. 20)

external relations, etc., are obvious examples of areas in public administration where secrecy is warranted, at least for quite some time to come. In this category can also fall negotiations with international organisations as well as between the centre and the units in a federal set-up, economic intelligence about citizens, matters having high commercial value, etc.

In India, the Central Government should delimit the jurisdiction of secrecy, and initiate a process of de-secretisation of information in an imaginative way The law interfering with such a course of action must change, and equally important, the mandarins' attitudes should be more positive, public-oriented and equity-based. The maxim guiding their action should be: "How much more about the government's functioning can be given to the citizens". Secondly, over-classification of papers is endemic in Indian administration and this needs to be discouraged. There is an indiscriminate use of designations such as 'top secret', 'secret', 'confidential', etc. This entails unnecessary trouble and waste of time and has its danger in tending to lessen the attention which is paid to them. It is essential that only such papers, the contents of which are in reality secret or confidential, should be so treated, and the decision in this respect should be of a fairly senior officer. Thirdly, there is at present no uniform criteria, much less scientific ones, governing the classification of official information. Nor is there any government-wide systematic review of the existing classificatory practices. Fourthly, there is presently an absence of any arrangement for de-classification of papers No paper should be treated as secret or confidential indefinitely. Many documents in a government may be secret or confidential but only until the occurrence of some particular event or announcement. In such cases it is malicious to continue afterwards to treat them in this way. What is suggested here is that there should be periodic scrutiny of the classified documents. This scrutiny should be undertaken by fairly senior civil servants and should be at an interval of, say, five years

Today, the Government of India is collecting an unprecedented range and volume of information relating to citizens, and to this end it has created a number of organisations such as the Intelligence Bureau, Central Bureau of Investigation, Directorate of Revenue Intelligence, Directorate of Inspection, Directorate of Enforcement (Foreign Exchange Regulation Act) etc. All these make serious and deep inroads into the privacy of citizens, which should cause concern to all right-thinking persons It is necessary that only that information about citizens' life which is absolutely necessary gets collected, and it must remain available only to the organisation collecting it and for the purpose for which it is gathered To avoid abuse, it may be good to create such agencies under well-defined charters of duties.

EPILOGUE

Administrative India puts the greatest weight upon keeping official infor-

mation secret. The Official Secrets Act has tended to socialise the civil service in a gravely negative frame of mind *vis-a-vis* the citizens, and this feature struck Paul H. Appleby in no uncertain manner. He sadly observed: "The new government has not yet got away from an arbitrary secrecy unnecessarily depriving Indian university professors and citizens generally of desirable information."[20] Excessive secrecy has been fostered by the law no less than by the civil service attitudes themselves; secrecy signifies the civil servants' authority and authority ceases to be so if it gets shared.

Such orientations produce deep contradictions in the larger socio-political system of the land. As the latter is still relatively new and in its infancy its growth processes inevitably get retarded for want of information about the government, which means *from* the government. Open society and closed administration ill go together. Over-concealment of governmental information creates a communication gap between the governors and the governed, and its persistence beyond a point is apt to create an alienated citizenry. This puts democracy itself weak and insecure. Besides, secrecy renders the concept of administrative accountability unenforceable in an effective way and thus induces an administrative behaviour which is apt to degenerate into arbitrariness and absolutism. This is not all.

The government, today, is called upon to make policies on an ever increasing range of subjects, and many of these policies must necessarily impinge on the lives of the citizens. It may sometimes happen that the data made available to the policy-makers is of a selective nature, and even the policy-makers and their advisers may deliberately suppress certain viewpoints and favour others. Such bureaucratic habits get encouragement in an environment of secrecy; and openness in governmental work is possibly the only effective corrective to it, also raising, in the process, the quality of decision-making. Besides, openness has an educational role in as much as citizens are enabled to acquire a fuller view of the pros and cons of matters of major importance, which naturally helps in building informed public opinion, no less than goodwill for the government.

This apart, freedom of expression, a fundamental right, remains an incomplete, even empty concept without the right to information, which the Official Secrets Act sets out to negate. Of what avail is this freedom if the channels of information to the public are extremely attenuated and dried up. Rightly has the International Covenant on Civil and Political Rights declared: Everyone shall have the right to freedom of expression: this right shall include freedom to seek, receive and impart information.

□

[20]Appleby, Paul H., *Public Administration in India : Report of a Survey*, Delhi, Manager of Publications, 1953, p. 30

The Right to Privacy and Freedom of Information: The Search for a Balance

R.B. Jain

THE FRIGHTENING growth of postwar technology, added to the ever growing insatiable appetite of government and commerce for personal information, has brought into force the question of the existence of the right to privacy. The right to privacy is considered to be one of the most basic of human rights, yet the governmental systems all over the world have been increasingly eroding this right. Democratic systems in particular are facing a dilemma between the individual's right to be protected against interference (with his private, family or home life, or his physical or mental integrity, or his moral or intellectual freedom, or his private correspondence, written or oral, against the disclosure of embarrassing facts relating to his private life) and the public's need for access to information in order to discuss policy issues intelligently and to exercise effective control over the government. The issue generally concerns the interface between the public's asserted right to know and the individual's right to determine when and what the public shall know of him.

THE NATURE OF PRIVACY

In order to discuss the controversy, let us first try to understand the meaning and nature of privacy. As generally believed, privacy implies a normative element. It is the exclusive access of a person (or other legal entity) to a realm of his own The right to privacy entitles one to exclude others from: (*a*) watching, (*b*) utilising, (*c*) invading (intruding upon, or in other ways affecting), his private realm [1] Privacy, as some scholars regard it, is a living reality, the nerve centre of a whole creative personality The health of the organism demands its unfettered freedom, consistent with the interests of the community at large In conditions of tyranny it cannot flourish, and the individual then becomes a grey functioning cog in a soulless society [2] An exclusive freedom is thus the

[1]See Ernst Van Der Haag, 'On Privacy' in J Roland Pennock and John W Chapman (eds), *Privacy*, New York, Atherton Press, 1971, p. 149

[2]Donald Madgewitch and Tony Smythe, *The Invasion of Privacy*, London, Pitman Publishers, 1974, p 177.

most essential element for him to grow and live with dignity.

The norms invoked by the concept of privacy are diverse, not only in substance but also in the logical form; some grant immunities; some are prohibitive; some are mandatory. There may be, cultures, indeed, with no norm-invoking concept of privacy at all, where nothing is held immune from observation, and anything may be generally displayed. It might still be possible, of course, to seek out private situations where one would not be observed, but it would never be a ground of grievance either that an action was or was not open for all to see or that someone was watching. Whatever the possible diversity, some privacy claims seem to rest on something more solid than mere cultural contingency.[3] It is the universal realisation of the fact that there still are certain areas in which an individual can himself be free from external restraint or observation, irrespective of the cultural permissiveness that seems to be the accepted basis of the right to privacy.

THE NEED FOR THE RIGHT TO PRIVACY

In many countries of the world, the right to privacy has long been indirectly protected by outlawing offences such as trespass or burglary, which can scarcely be committed without violation of privacy. But the need to protect privacy *per se* has become more salient now. For one thing, technology has made it possible to violate privacy without trespass, and, for another, powerful communications media find it more and more profitable to violate privacy in the service of public curiosity.[4] Perhaps the most important emergent factor, as has been suggested by Arnold Simmel, has been the development of new technologies that threaten privacy from ever new directions. These developments have greatly increased the possibility of observing the activities of individuals and groups, of disturbing their equanimity or internal balance, and of influencing or controlling their behaviour. Such possibilities may become realities unless effective social control mechanisms are developed. Law does provide one such mechanism but in a period of rapid social change, the heterogeneity of social norms and beliefs leaves much uncertainty and instability of behaviour in those areas of action which law does not seek to control, or fails to control.[5]

Technology provides the material potential for electronic spying and high speed record keeping and information retrieval; for psychological testing and psychiatric interviews; for the use of drugs and other psychological agents, as well as methods of physical deprivation, irritation, and coercion which, contrary to the victim's wishes and interests, may unveil the secrets

[3] Stanley I. Benn, "Privacy, Freedom and Respect for Persons", in J. Ronald Pennock and John W. Chapman (eds), *op. cit.*, p. 3.

[4] Ernst Voan Der Haag, *op. cit.*, p. 130.

[5] Arnold Simmel, "Privacy" in *International Encyclopaedia of the Social Sciences*, Vol. 12, pp. 480-86.

of his mind; and for the manipulation of groups to make people confess or turn informers. The chances that these methods will be used are vastly increased if the ideologies in particular countries are at hand to legitimise such use.[6] Thus in circumstances when *ideologies*, political or religious, demand orthodoxy of all citizens, or when confessions of guilt or the punishment of persons, irrespective of proof of guilt, are considered justifiable on administrative or political grounds, spying and informing, forced confessions and coercive persuasion will flourish. Ideologies of religions, or political 'purity', of 'moral community' or of 'mental health', can be and have been employed to legitimise the use of psychological techniques for the manipulation of behaviour in flagrant disregard of time-honoured concepts of personal integrity.[7]

There are, however, critics who hold dramatically an opposite views on this subject. One such critic of privacy, H.W. Arndt observes:

> The cult of privacy seems specifically designed as a defence mechanism for the protection of anti-social behaviour. .. The cult of privacy rests on an individualist conception of society, not merely in the innocent and beneficial sense of a society in which the welfare of individuals is concerned as the end of all social organisations, but in the more specific sense of "each for himself and the devil takes the hindmost . ." An individualist of this sort sees 'the Government' where we might see 'the public interest', and this Government will appear to him often as no more than one antagonist in the battle of wits which is life—or business.[8]

Despite these attacks on the right to privacy, scholars have been quick to point out that it is in the respect for privacy, as much as in any other single characteristic, that a free society differs from the totalitarian state

THE INFORMATION RETRIEVAL SYSTEMS AND 'PRIVACY'

In recent times many governments have felt the need for the creation of a national data centre containing detailed biographical and personal information about individuals in various walks of life in a society—ostensibly for better planning and policy purposes. Such a move has, however, been frequently opposed as an infringement on the individual's right to privacy. The resentment to the idea of a national data centre, collating all that is known about an individual from his past contacts with government agencies, is evoked by the close connection between the general principle of privacy and the respect for persons. Much has been made, of course—and no doubt

[6]Arnold Simmel, *op. cit.*, pp. 480-86,
[7]*Ibid.*
[8]H.W. Arndt, "The Cult of Privacy", *American Quarterly*, Vol. 21, 3, September 1969, pp. 70-71.

and, at the same time, serve as a sort of control mechanism on the bureaucracy's corrupt and arbitrary behaviour. Thus citizens in many countries have claimed a 'right to information' as against the government's need for administrative secrecy in certain areas. Many scholars have felt that the present balance between the two conflicting claims favours too much secrecy, and that a public right to access of administrative documents ought to be established by a specific law. To delineate the boundary between warranted and unwarranted secrecy and to enquire into the lines on which a satisfactory balance could be struck between the legitimate requirements of the citizens, science, and industry for freedom of information and the need of the government (for quite specific and justifiable reasons) to keep certain information confidential or even strictly secret has been the key problem in public administration today and which has defied a universally acceptable solution [11]

The provision in certain countries that computer records holding highly personal information about citizens are to be classified as documents for purposes of public access, has raised new problems converging on the issues of 'privacy' vs. 'secrecy'. While, on the one hand, the easy availability of computer information may be regarded as a danger to personal privacy, on the other, its centralisation and difficulty of access by the average citizen makes it easier to withhold. The argument about secrecy and publicity has thus continued and is a live subject of discussion over parliamentary procedure and governmental operations.

In modern thinking, secrecy belongs to the group of phenomena which while ubiquitous in politics is considered morally objectionable or, at least, an instrument of potential misuse, such as corruption and betrayal (treason). Secrecy has traditionally been condemned by the more radical liberal and democratic thinkers, and publicity has been claimed to be essential to desirable public life. Immanuel Kant was inclined to make publicity the touchstone of one's acting morally, secrecy carried the implication of something questionable and presumably morally obnoxious. Bentham thought that parliamentary debates required publicity and was prepared to make it an absolute standard. It is thus evident from available literature that secrecy is found throughout public life, and that some types of secrecy, that is, secrecy under some circumstances, in some situations, is functional, whereas in others it is disfunctional.[12]

In the debates over these issues it is often overlooked that secrecy is a main behavioural aspect of an effective bureaucracy, whether governmental or private. A good many arguments on behalf of privacy are in fact meant to protect the secrecy of industrial and commercial operations Rules and

[11]The extent of administrative secrecy prevailing in many developed societies has been admirably presented by Prof. Donald C Rowat in his edited work *Administrative Secrecy in Developed Countries*, London, 1977.

[12]Carl J. Friedrich, "Secrecy Versus Privacy . Democratic Dilemma" in Pennock and Chapman (ed.), *op. cit* , pp. 105-6.

regulations looking towards secrecy have played a considerable role in the development of bureaucracy. The determined effort of organisations to keep secret their important evidence in controversial and competitive situations shows that such secrecy (privacy) is functional.[13]

Prof. Friedrich considers privacy as a special form of secrecy. Since secrecy is endemic in all social relations, it is also there in politics. But the functionality of privacy and secrecy are dependent upon the system of which they form a part, and hence their evaluation must vary. At the same time, secrecy acts as a factor of systems influencing each other, and the destruction of privacy and enlargement of official secrecy, and indeed the entire apparatus of the secret police state, has forced democratic states to adapt to the world of totalitarian competition, to increase official secrecy, and reduce privacy by the institution of police and investigatory methods resembling those of the autocratic order. 'Thereby' argues Friedrich, "they have endangered their systemic order and hence their internal security".[14] In his opinion, making the innermost self secure is more vital to the security and survival of a constitutional order than any boundary or any secret. It is the very core of the constitutional reason of state. Insight into this need for maintaining privacy against all clamour for official secrecy is still missing in many quarters and the trend has been in the opposing direction. The functionality of officials and of private secrecy is in a delicate balance. It is difficult at the present time to assess the eventual outcome of the conflict between these two claims for secrecy.[15]

'RIGHT TO PRIVACY' AND 'FREEDOM OF INFORMATION': THE AMERICAN EXPERIENCE

The conflict between a society's desire to protect the 'invasion of privacy' and yet grant its citizens the right to freedom of information is nowhere better illustrated than in the USA ten year campaign in the US Congress, in which representatives of the news media played a leading role culminated in 1966 in a revision of the Public Information Section of the Administrative Procedure Act, leading to the enactment of the Freedom of Information Act (FOIA), 1966 Complaints during the 1972 Moorhead hearings about bureaucratic foot-dragging in administering FOIA, largely voiced by public interest groups such as those of Ralph Nader, coupled with the widespread concern during the 1973-74 Watergate period over excessive government secrecy. resulted in the 1974 FOIA Amendment. The FOIA[16] is the chief federal law on openness in government. FOIA is an open records law, and provides that 'any person' has a right, enforceable in court, to access to all 'agency

[13]Carl J. Friedrich, *op. cit.*, p. 111.

[14]*Ibid*

[15]*Ibid*, pp. 119-20

[16]5 U S C 552, originally passed in 1966, effective in 1967 and amended in 1974 became Public Law 93-502, 21 November 1974

records'—generally any record in the possession of a federal agency—except to the extent the records or parts of them may be covered by one of FOIA's nine exemptions

The law obliges the federal officials to respond, within fixed deadlines, to requests from 'any person' for government documents Disciplinary action can be taken against the officials for any arbitrary or capricious withholdings The FOIA thus applies to almost the entire range of federal activities and claims to have resulted in a much more open government. The new law has led to the uncovering of thousands of hitherto secret documents on historic events and the present day controversies ranging from the Rosenberg spy case to the manoeuvering behind India's 1974 atomic explosion.

About a month after the enactment of the FOIA, the US Congress also enacted the Privacy Act.[17] The Privacy Act of 1974 is based on the Congressional findings that: (*a*) the maintenance of personal information systems by federal agencies directly affects an individual's privacy, (*b*) the proliferation of information systems, including computers, while necessary for the efficient and effective operation of the government, presents a major potential for harm to individual privacy, and (*c*) it is necessary and proper for the Congress to control personal information systems operated by federal agencies in order to protect the privacy of individuals identified in their systems.[18]

The objective of the Privacy Act of 1974 was to provide safeguards against the invasion of personal privacy by requiring federal agencies (except otherwise provided) to (*a*) permit an individual to ascertain what records pertaining to him are contained and used in an agency's information system, (*b*) permit an individual to determine that information gathered for a specific purpose is not used for other purposes without his consent, (*c*) maintain information systems only for necessary and lawful purposes and ensure that data is current and accurate for its intended use and that adequate safeguards prevent misuse of the information, and (*d*) permit exemptions when important public policy requirements for such exemptions have been demonstrated.[19]

The US Privacy Act rests on the principle that: (*a*) there must be no personal-data record keeping systems whose very existence is secret, (*b*) there must be a way for an individual to find out what information about him is in a record and how it is used, (*c*) there must be a way for an individual to prevent information about him obtained for one purpose from being used or made available for other purposes without his consent, (*d*) there must be a way for an individual to correct or amend a record of identifiable information about himself, and (*e*) any organisation creating, maintaining, using, or disseminating records of identifiable personal data must assure the reliability of the data

[17]Public Law 93-579, 31 December 1974

[18]Hugh V. O'Neill, "The Privacy Act of 1974. Introduction and Overview", *The Bureaucrat*, Vol. 5, 2, July 1976, p. 135.

[19]*Ibid.*, pp 133-4.

for their intended use and must take reasonable precautions to prevent misuse.[20]

FOIA AND THE PRIVACY ACT: THE INTER-RELATIONSHIP

Although it is contended that the two Acts come in close conflict with each other and the one negates the purpose of the other, the experience in America suggests a close inter-relationship between the two. The Privacy Act governs the manner in which the federal government collects and uses certain information about individuals and grants individuals a right of access, subjects to certain exceptions, to records pertaining to them. Either the Privacy Act or FOIA or both may be used by an individual seeking access to information about himself in agency records. But the two Acts differ considerably in purpose, scope, procedures, and effects.

The general purpose of FOIA is to protect the public's right to know, while the Privacy Act is intended to give the individual better control over the gathering, dissemination, and accuracy of agency information about himself. FOIA gives a person a right of access to everything in agency records except for the nine exemptions; the Privacy Act gives the individual two principal sets of rights as to certain records that contain information about himself — rights of access and rights to exclude others from access without his consent— with each set of rights subject to its own list of exceptions. FOIA constitutes an important exception to the individual's right under the Privacy Act to exclude access by other persons to records about himself.

The two Acts also are different in scope: all agency records are under FOIA, but only the records in a 'system of records' are subject to the Privacy Act A 'system' is defined as a group of records from which information is retrieved by the individual's name, social security number, or the like. Also, the concepts of 'records' under the two Acts are different Under FOIA a record is a repository of information, while under the Privacy Act a record is defined, in effect, as an item of information about an individual that has been recorded.

The two Acts provide different procedures as to fees, time limits, judicial review and other matters. They also provide different sources of guidance: the Justice Department provides guidance to agencies on FOIA, while the Office of Management and Budget provides guidance on the Privacy Act, though with legal assistance from justices.

Whether information about an individual is protectable depends chiefly on exemption 6 of FOIA, discussed above If the information is under FOIA exemption 6 and is also in a Privacy Act 'system', the Privacy Act eliminates the agency's option to make a discretionary FOIA release.

[20]Hugh V. O'Neill, *op. cit.*, p 145.

LESSONS FROM THE AMERICAN EXPERIENCE

The American experience of the operation of the FOIA and the Privacy Act has not been all that successful. The years of foot-dragging in the supply of information has not ended, despite its extensive use made by the American business, the Washington law firms, the general public, historians, scientists and public interest groups. The members of the press found the law officer too sluggish for them. Some federal agencies, like the selective servicing system, have been found to be inventing their own excuses to duck the freedom of information law. The selective service system refused to make public even the annual report to the Congress that the streamlined freedom of information law required, thus retaining the penchant for secrecy[21] If many federal agencies are dissatisfied with the way the FOIA has worked, so are many members of the public. For those who request information from the government, the problem is not so much that they cannot find what they seek, as that it seems to take the government for ever to produce it

However, the operation of the FOIA has not, surprisingly, made any deep inroads in the operation of Privacy Act, thereby suggesting that the contradictory two could be reconciled and held in balance. The need for strengthened fair information practice safeguards is an intricate social issue involving organisations, prerogatives, personal values and attitudes, computer and communication technology, and a delicate balance between personal autonomy and a genuine need for information in both the public and private sector.[22]

On the other hand, the heart of the 'privacy protection issue' is the nexus between uses that organisations make of records they keep about individuals and the effects such uses can have on each of us as an ordinary individual. What many implicitly sense, and what in the final analysis may prove to be the pivotal issue, is that the records about individuals will be used to tighten the processes of society to such an extent that they will lose some of the personal autonomy they now have Sociologists call the phenomenon 'strengthening the mechanisms of social control' but, however may be that one wishes to label it, the fact of the matter is that, recorded personal information can be, and has been, used to compel people to do things or to prevent them from doing things that they might have been better advised to do or not to do voluntarily.[23] This specifies the need for striking an acceptable balance between the legitimate needs of government and society for information and the individual's need to have his privacy—his 'personal autonomy'—

[21]For a very illuminating series of articles on the operation of the FOIA see George Lardner Jr, "Freedom of Information Act . Years of Foot-Dragging Not Ended" in *The Washington Post*, 26, 27, 28, 29 July 1976.

[22]Willis H. Ware and Carole W Parsons, "Perspectives on Privacy A Progress Report", *The Bureaucrat*, Vol. 5, 2, July 1976, p. 156.

[23]Neill, *op. cit.*, p 143.

respected.[24]

The above discussion in the context of a developed democratic society may not prove to be relevant in developing countries like India, where the issue 'privacy vs. freedom of information' has not yet taken such a debatable proportion. However, developments in the Indian political system of the last five years or so do point to the fact that in the coming decade, in all likelihood, this issue will be the pre-runner of other information related issues on which a coherent and a rational public policy will be needed. The events leading to the declaration of emergency in 1975, the developments that took place during 1975-79, the efforts of the Shah and other enquiry commissions to unearth the correct information for public consumption and the personal, legal and political conflicts in which the public officials (both political and administrative) found themselves while discharging their lawful obligations have certainly highlighted the need for some legislative instrument to strike a proper balance between these two basic and seemingly conflicting propositions, especially in the context of an administrative system, which has traditionally been notorious for its conservatism and excessive secrecy.

Thus the protection of privacy requires not only a degree of consensus in the total population about the rights of the individual, who may be poor, uneducated, and of minority groups, and adequate laws to recognise these rights, but also considerable efforts by those who exercise influence and wield power, governmental or otherwise, to enforce the laws and to encourage compliance with the moral, general, social norms of respect for the individual. However, the emphasis on the right to privacy should not obscure the fact that governments and other collectivities have legitimate concern over private aspects of their members' lives. Laws establish only guidelines for the competition between the autonomy of the individual and his government; the understanding of that competition requires further study of the functions of privacy for individuals, for collectivities, and for the relationships between the two.[25]

In the final analysis, as Snyder contends, we must assure freedom and integrity of the flow of information in our society; for in a community which has grown so large and complex we cannot personally experience its reality; we will have to depend upon the reality inferred from the data flow to inform our decision-making. To the extent the data is complete, correct and timely, our decisions will be as correct as our collective decision-making processes will permit. To the extent that the information is incorrect, incomplete or substantially delayed, our decisions will be inadequately informed, and subject to greater error. And during the coming decades, we will have precious little margin for error.[26]

[24]Neill, *op. cit.*, p. 144.

[25]Simmel, *op. cit.*, p 486.

[26]David P Snyder, "Privacy : The Right to What?", *The Bureaucrat*, Vol 5, July 1976, p. 225.

CONCLUDING OBSERVATION

A question has been frequently asked: Is privacy outmoded, destined for the trash heap in a new 'holistic society'? The answer is a clear 'no'.

Privacy is so much a cornerstone of liberty that it pervades all our daily lives in numberless small ways, affecting human relationships at the most personal levels It is not enough to leave it all to the legislators' or the administrators' discretion. We must all be 'whistle-blowers' or vigilants, realising what the issues are, and being prepared at all times to take up the cudgels to guard what is one's by right We must fight the official notion that our rights are mere privileges, grudgingly given and liable to be taken away at the first sign of alarm or hysteria.[27]

However, the question is: whether we will continue with the tensions that mark our present society in which the power of the state is used to enlarge the sphere of privacy for the benefit of the individual while, elsewhere, at the same time, it is intruding upon that same sphere. Or are certain areas of life inherently more private than others? Or is it more important that the individual should have complete autonomy in *some* areas, regardless of what they are, than that the lines between private and public should remain for ever unchanged? These have been posed again and again and will continue to be debated by the academics and the intellectuals.

In the ultimate analysis, and in the background of its continued erosion by the governments of the day, the issue of the 'right to privacy' is no longer administrative, political, legal or cultural, but has acquired the dimension of an issue of human rights, and has to be treated from a universal perspective A consensus on the boundary line where privacy ends and public gaze begins may have to be evolved soon if a terrible future through the technology of behavioural control as predicted by George Orwell is to be avoided

□

Privacy and Its Eclipse

Privacy is personality and its eclipse is also the eclipse of human rights

—Mr. Justice V.R. Krishna Iyer,
Judge, Supreme Court of India, in a
Recent Talk in IIPA

[27]Madgewitch and Smythe, *op. cit*, p. 175

Open Government in the United States

O. Glenn Stahl

ALL ASPECTS of governing entail resolution of adversary relationships But no issue resulting from exercise of authority seems to consist almost entirely of such tensions as much as secrecy in government. The conflicts seem boundless: the public's right to know *vs.* the government's obligation to administer without undue interference; the eternal struggle between agents of the press *vs.* public officials; an individual's need for information possessed by government *vs.* another individual's privacy; open covenants, openly arrived at *vs.* the practicalities of negotiating procedure; keeping government processes open *vs.* the enormity of continual tapping of the computerised information explosion; a newsman's desire to protect his sources *vs.* an official's desire to know his accusers; the need to expose conflicts of interest *vs.* an official's right to a private life; the saleability of bad news over good news *vs.* the impossibility of publicising all actions; sensationalism *vs.* the whole truth; and, of course, the very sensitive strain between a public's right to know *vs.* protection of that public by ensuring that military or related information does not fall into the hands of a potential enemy.

Concentrating our attention on a democratic polity (for an authoritarian state makes no pretence of open government), we all know that every government based on the consent of the governed experiences the foregoing tensions every day. The United States of America is no exception. Young as it may be culturally, this oldest democratic society has probably dealt more fully, forthrightly, and continually with openness *vs* secrecy than any other nation. Yet, a renewed concern with the issue has especially preoccupied Americans in the past two decades.

ROOTS OF OPENNESS

The foundation for openness in government goes back to the constitution established in 1787. Its roots lay in the revulsion against monarchy and absentee government inherent in the colonial situation prior to the revolution of 1776. Its expression was most directly provided in the first amendment to the constitution which forbade the legislative body, the Congress, from passing any law "abridging the freedom of speech or of the press "

James Madison, one of the constitution framers and fourth President of

the United States, said: "A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both." It was recognised early in the nation's history that even in a well-ordered democracy the instinct for official self-preservation is strong and must be tempered with a counter force. Thus the emphasis on a free press And in the mid-twentieth century a cabinet member[1] put the principle well when he said: "If the idea of a democracy should ever be invalidated, it will be because it came about that more and more people knew less and less that was true about more and more that was important." Still, we are reminded of the eternal dilemma by George Bernard Shaw's words: "Liberty means responsibility That is why most men dread it."

In spite of the vision of the forefathers, openness in government did not spring full blown overnight It grew in degree and in detail over the decades, and it depended greatly on the persistence of an aggressive press.

Sessions of legislative bodies—the Congress, state legislatures, city councils—were open to public scrutiny almost from the beginning Judicial trials were, for the most part, conducted openly—although it is significant that juries have always deliberated in secrecy and continue to do so, with practically no objection from any source. Indeed, on occasion, committees of legislative bodies hold closed sessions (usually called 'executive sessions') when they consider matters relating to national security or to criminal investigations It should be noted in passing that two conditions seem to characterise rationalisation for closed meetings· either (1) the need to protect the subject matter being dealt with from exploitation by enemies or suspected law breakers; or (2) the need to insure free and uninhibited discussion and deliberation by a deciding body Both of these considerations should be borne in mind when we extend our inquiry into the third branch of government—which bears the brunt of the attention and debate over secrecy—the executive branch.

ACCESS TO THE EXECUTIVE

Curiously, when journalists or scholars agonise over alleged secrecy in government in the United States, they almost invariably are thinking about chief executives and their principal subordinate officials It is in this arena that argument goes on, with hardly any attention at all to dispositions towards secrecy on the part of legislators and jurists. Perhaps this merely mirrors the fact that so much of what we call government nowadays emanates from executive sources, as well as the human propensity of administrative officers, both elected and appointed, to play as many of their cards close to their chests as they can get away with.

[1]W. Willard Wirtz, who was Secretary of Labour under Presidents Kennedy and Johnson, from 1962-69

Much of the most recent agitation against secrecy in this country stems from the shock of revelations of official misconduct during the Nixon period (1969-74). However, even the most avid supporters of open government acknowledge limitations on the ideal as far as Presidents and other executives are concerned. For example, the joint editors of a book of essays whose bias is betrayed in heavy sarcasm by its title, *None of Your Business*, observe:

> There are situations in which secrecy is permissible, even desirable. Thus, a government should be able to protect certain military and diplomatic information of potential value to enemies; to safeguard the process of decision-making by protecting confidences in order to encourage frank discussions; and to assure that private information about people is not widely disseminated.[2]

The two major bastions used by the executive to protect such legitimate secrets are: (1) the classification of documents, that is, the varying degrees of restriction of use and access concerning reports, communications, and other papers that deal with military, diplomatic, or other affairs involving the national security; (2) the doctrine of 'executive privilege.'

The need for classification of documents is unquestioned. The debate is simply over whether it is overdone. Journalists are inclined to think that government officials are too prone to label something as having to do with national security when its connection is remote; officialdom, on the other hand, thinks that journalists often don't know what they are talking about. Whether the general public can ever determine who is most right on this issue is doubtful, although fear of 'over-classification' by executives is considerably mitigated by the practice of allowing legislative committees to peruse classified documents whenever it is necessary for the body to use them in their development of legislation or in their conduct of official inquiries. In other words, the representatives of the people do have access to these materials on occasion and can be depended on to complain if they think many of them are unnecessarily restricted.

The matter of 'executive privilege' is somewhat more elusive. This refers to the long-standing practice on the part of Presidents of the United States to withhold information specifically requested by the Congress. It is ostensibly based on the constitutional authority of the President to "take care that the laws be faithfully executed" and the general structural independence of the presidency under the American system. Between 1952 and 1974 this privilege of withholding information was asserted a total of fifty-one times, an

[2]Norman Dorsen and Stephen Gillers (eds), *None of Your Business*, New York, Viking Press, 1974 Foreword, p vi.

average of a little over two occasions per year.[3] Some observers consider this too much; others, and they seem to be in the majority, tend to see the matter in more perspective and view these invokings as 'comparatively rare occurrences'

Students of the subject condone the doctrine of executive privilege on the ground of the legitimacy of secrecy in such areas as the following: (1) military and foreign affairs, which are covered by the system of classified documents and rest on specific statutory authority (although, as mentioned, on occasion even classified papers are made available to congressional committees), (2) investigatory files and litigation materials, which are amply covered by statute; and (3) advice received within the executive branch, which distinguishes *action* (which is available) from the processes and advice that led to the action, and which is necessary to protect the integrity and willingness to be heard of career civil servants One modern amendment to the executive privilege concept, highlighted during the Nixon administration, is the doctrine that even a President cannot withhold information on matters in which criminal conduct is implied by already available evidence

Journalists, in their proverbial 'fishing expeditions', notoriously ignore the idea of protecting the confidentiality of the advice process within the executive branch. If they can extract from someone down the line a few titbits about what is likely to be recommended to a department head or the President, they usually jump at the chance to reveal their findings (while never revealing their sources) Likewise, members of Congress often seek to intimidate lesser officials into giving out in advance of final decisions what is likely to occur Obviously, such violations of the administrative process compromise the integrity of the process, handicap top executives in taking responsibility for their decisions, and slow down the entire system

THE FREEDOM OF INFORMATION ACT

The most significant development relating to the secrecy issue in this country has been the Freedom of Information Act passed by Congress in 1966 and further extended in 1974 As distinguished from legislators, both individually and collectively, who have for the most part had access to practically everything they really needed from executive agencies, the average citizen or private groups have not had as easy a time to get *unpublished* information from their government Published material, yes, the United States Government probably publishes more data and reports on a broader variety

[3]The Presidents in office during these years were Eisenhower, Kennedy, Johnson, and Nixon Twenty-one of the occasions occurred under Nixon, who averaged over four per year Data is hard to come by as to previous use of the privilege, but its use is understood to have declined until the Nixon period Undoubtedly it was more frequently invoked before the advent of document classification before World War II.

of subjects than most of the rest of the world's governments put together. But obviously much remains unpublished. It was to meet this occasional need on the part of private citizens that the Freedom of Information Act was legislated. Previously, there had been no clear guidelines to assist a citizen seeking information and no remedies for denial of access.

The effect of the new law was:

1. to shift the burden from the individual to the government; that is, the onus is now on the government to justify secrecy;
2. to replace a 'need to know' standard with a 'right to know';
3. to require any request to be met, provided any expense of searching and duplicating records is paid for;
4. to establish standards for what records are open to public inspection and judicial remedies for any aggrieved citizen; and
5. to require federal agencies to provide the fullest possible disclosure.

Prior legislation had simply authorised secrecy for 'good cause' or to protect the 'public interest,' and in 1958 had modified the longstanding official authority to regulate storage and use of records by clarifying that this did not authorise withholding them from the public.

The Freedom of Information Act covers opinions and orders within an agency; policy statements and interpretations not already published; staff manuals; and records that affect the public. Further amendments passed in 1974 speeded up and eased the process of access, requiring prompt responses; required uniform and moderate fees for locating and copying records; called for publication of indexes for administrative processing of requests; and required release of parts of documents even where some parts met the statute's standards for confidentiality.

The new law denies access only for the following categories of material:

1. classified documents concerning national defence and foreign policy;
2. personnel and medical files, and other material concerned solely with internal personnel rules and practices;
3. confidential business information (*e g.*, trade secrets, data on financial institutions, certain geologic data, etc);
4 investigatory files;
5. internal communications; and
6. information exempt under other laws.

The exceptions appear to be sufficient to prevent any unnecessary burdens on administrative agencies and still allow maximum access to the average citizen.

THE PRIVACY ACT

Related to the Freedom of Information Act, although at some points requiring some reconciliation of purposes, is the Privacy Act of 1974. The main thrust of this legislation is to maximise an individual's access to records about himself but to protect the privacy of individuals from snooping by others. This law allows a person to review most files pertaining to himself, requires that these be complete, accurate, and up-to-date; allows the individual to challenge their accuracy, gives him significant control over how information concerning him is used; prescribes that information obtained for one governmental purpose (*e g.*, taxable income, census data, etc) not be used for another purpose, and restricts disclosure of personal information about an individual to others except with his consent.

Files of the Central Intelligence Agency and of criminal law enforcement agencies, plus investigatory materials of all law enforcement agencies and intelligence files of the U.S. Secret Service are proscribed from any access Access is also denied for files used solely for statistical purposes, investigatory material for federal employment, military service, contracts, and security clearances; testing or examination material used solely for employment purposes; evaluation material used in making promotions in the armed services; and, of course, classified material concerning national defence and foreign policy

It should be noted that, while protecting the individual citizen from inappropriate use of data about himself, the Privacy Act, like the Freedom of Information Act, is clearly designed to open up government files to any individual provided they do not breach the rights of others or the security of the state.

OPEN MEETINGS

On the heels of the foregoing legislation, a law was passed in 1976 (effective in 1977) that requires forty-seven multi-membered federal agencies to open most of their regular meetings to the public Known as the 'Sunshine Act', this Act applies mainly to regulatory bodies like the Inter-State Commerce Commission, the Federal Trade Commission, the Federal Communications Commission, the Securities and Exchange Commission, and other agencies concerned with regulating economic behaviour. A number of these sessions had been normally open before, but the new law pinned the matter down and again put the burden on the government organisation to justify secrect meetings.

An organisation that monitors such events reports that during the first year of operation under the new Sunshine Act only 38 per cent of all meetings were 'entirely open to the public.' Attention is drawn to the term 'entirely'. It is quite likely that many sessions were *partially* open, being closed only

for such portions of time as were devoted to prescribed matters, such as personnel decisions or commercial issues that would have revealed trade secrets.

ETHICAL CONCERNS

Closely related to matters of secrecy and openness, to say nothing of privacy, has been the whole range of legislation prescribing that top officials report their major financial holdings—as an openness feature designed to insure against unwarranted conflicts of economic interest on the part of federal appointees, plus legislation which limits the kinds of activity (at least for certain periods) that departing officials can engage in after they leave government—as an effort to discourage misuse of inside information on behalf of some client or for one's own aggrandisement.

Both the restrictions on one's post-government occupation and the demands for full financial disclosure suffer from focusing on external appearances as against the actuality or likelihood of conflicts of interest As I have observed elsewhere, it is naive to expect that these particular kinds of openness solve all problems by concentrating on the prospects of temptation instead of on the crime.[4]

OPENNESS IN THE FIFTY STATES

As with any governmental subject about the United States, one must always be reminded of the high degree of decentralisation in the American system. It is quite relevant to our subject here. Generally, the states were ahead of the federal government in enacting open-meeting or 'sunshine' laws for their state and local boards and commissions, but they lagged behind the national level in passing freedom of information or access-to-records laws.

By 1978 forty-eight of the fifty states had freedom of information statutes on the books, mostly paralleling the provisions of the federal law of 1966. State open-record laws usually do not include police logs or arrest records as available on demand, but there has been a long tradition on the part of the overwhelming preponderance of police departments to make these current records completely available to members of the press

A major area of information still in controversy in many localities has to do with welfare records. Obviously, welfare recipients do not often relish having their dependency on the public weal widely known. Yet, a substantial proportion of public funds is usually involved, and many taxpayers feel that, embarrassing or not, those who foot the bill have a right to know how the money is being spent. This dilemma between the public character of the funds

[4]Space does not permit a full discussion of this subject here The reader is referred to Chapter 16, "Public Service Ethics in a Democracy," in the author's book, *Public Personnel Administration*, 7th ed , New York, Harper & Row, 1976.

and the privacy of welfare recipients is not likely to be resolved with any finality in the foreseeable future

Open meetings are another matter. All fifty states now have open meeting laws applying to both state and local agencies Of course, legislative bodies, state legislatures, and city or other local councils, have long conducted their main operations in public view. Committees of such bodies, however, have not had a tradition of as much openness as has existed in the sessions of their counterparts in the national Congress. The main effect of the relatively recent open meeting or sunshine laws has been to place the burden on the instrument of government itself to justify secrecy. Generally, 'executive sessions' of councils, boards, *et al*, are countenanced when they consider such matters as personnel issues, parole hearings, briefings by staff members, and subjects relating to local aspects of the national government's responsibility for national security. Actually, many boards and councils have favoured open sessions as a sound public relations policy, regardless of any requirement of law. Aggressive local newspaper behaviour has often contributed to this practice.

Disclosure of officials' financial interests now is provided for in many state and local jurisdictions, although this has for the most part been a more recent practice than has obtained in the federal government It is interesting that, so far as corruption in office is concerned (especially in the dealings between commercial firms doing business with the government and responsible officials), history has demonstrated a much greater proneness toward abuse (instances of bribery, favouritism, misuse of funds, etc) in local government in the United States than at any other level This reflects in my judgment not so much on the absence or recency of financial disclosure practices as on the greater lack of interest in local affairs and citizen neglect of local vigilance, in comparison with the high national concern with actions of the federal government.

THE UNRESOLVED ISSUES

We can perhaps accept as 'given' that too much secrecy in government is usually worse than too much openness. Nevertheless, the problems that arise in efforts to avoid or to offset secrecy do not suggest that attempts at resolution of this tension between secrecy and openness are simple Not only are they extraordinarily complex and often engage conflicts in basic values, they frequently seem insoluble in any general sense and suggest that we will be debating specific issues for generations to come Like in so many aspects of governance and administration, 'where you stand depends on where you sit ' Conscientious officials, with not the slightest tinge of desire to do anything except that which serves the general public interest, see the picture differently than the average citizen and certainly differently than the typical journalist or the self-appointed gadfly who sometimes makes a career of baiting public

officials.

I have already hinted here and there at some of the conflicts that plague this subject. Going beyond what I have already said about particular issues, such as executive privilege, practices of legislative bodies, and disclosure of financial interests, I feel a need to highlight several broad issues that are especially troublesome.

The Impact of Television

A number of state and local legislative bodies have for some time been 'open' not only in the traditional sense but even more pointedly by having television cameras focused on them—at least when, in the judgment of the media, the subjects up for attention seemed to call for such instant publicity. Some city council heads and state legislators who initially opposed this exposure have found the experience constructive and conducive to better deliberation. Even the federal Congress is tentatively experimenting with allowing some of its activities to be televised. The practice has often been used in recent years for important committee hearings, although rarely have they been broadcast in full when they lasted more than a few hours. Now there is prospect that some instances of general House or Senate sessions will be broadcast.

The limited number of hours in a day and the many competing demands on television time make certain that this particular form of openness is not likely to prevail for any great share of legislative deliberations. Furthermore, there are many thoughtful persons who doubt whether this medium is really very satisfactory in the long run. It certainly provides a 'field day' for demagogic grandstanding by the less sincere members of the body and may drive underground a lot of the negotiating and compromising that would otherwise take place. This, of course, is also applicable to regulatory bodies that deal with even more technical and complex subject matters than do legislative assemblies. Finally, one might ask whether it is not better to confine openness of meetings to those who are interested enough to attend rather than expose them to the greater temptations of demagoguery incident to TV broadcasting.

Interest in the Extraordinary

It seems to be an unavoidable disposition of the media, to say nothing of many individuals, to pay little attention to major issues and developments while spending an inordinate amount of time on trivia that is exciting, sensational, or highly charged with conflict or personal scandal. No wonder that many public officials shy away from too much exposure lest what they consider purely private matters become distorted by sensationalism in the press.

President Calvin Coolidge explained in his autobiography his own tight-lipped philosophy of the 1920s: "Everything that the President does potentially at least is of such great importance that he must be constantly on

guard . Not only in all his official actions, but in all his social intercourse, and even in his recreation and repose, he is constantly watched by a multitude of eyes to determine if there is anything unusual, extraordinary, or irregular which can be set down in praise or blame."

Immunity of the Judiciary

Whether it is a reflection of the power of the legal profession in American society or some other phenomenon, it is indeed curious that, with all the avid interest in this country in open government, the judiciary goes almost scot-free of the desire to open up important deliberative sessions to public scrutiny As I have pointed out, trials and hearings themselves are usually open but meetings of panels of judges and juries never are. No institution in this nation has had more impact on the life of our society than has the Supreme Court Yet, no one but the participants and their subordinates have any knowledge of the give-and-take that leads to important decisions

By no means do I mean to suggest that the situation be otherwise, but I can fully understand the executive official's envy of the pristine freedom that judges and juries have from the prying eyes of the press or the public in their arrival at judgments. Somehow we are content to rely on the results alone Certainly one can properly deplore any exposure of a jury's deliberations Can one imagine its discussion open to a surrounding public—with possible catcalls, demonstrators' yells, missile throwing, and the like? Not even the most avid libertarian contends that justice would be enhanced by such a process. However, some do press for just such exposure when it comes to regulatory agencies, administrative bodies, and legislatures.

So far, most deliberative processes are rarely invaded by outsiders, even in executive agencies, but they do not enjoy the immunity the courts seem to have from the contention that they *ought* to be so exposed Should such a contention move much beyond its current state of doubt, the unfortunate consequences for free exchange of views, for mutual respect for different points of view, and for eliciting *genuine* viewpoints from all participants would be disastrous to contemplate.

The Infirmities of a Free Press

Few would argue that a democracy's success and survival are not critically dependent on the leavening influence of the 'pitiless light of publicity ' But problems certainly arise over *who has the power to focus that light* There seem to be these shortcomings in total reliance on a free press, privately financed and managed by a professional elite

Haste and Journalism Journalists operate in a perpetual state of haste. This partly accounts for their missing subtle movements and the significance of events in favour of the loud and the strident And it explains in part their inability as generalists to understand fully what they are reporting

Dominance of Bad News. Journalists resolutely resist culpability as to the

common charge that they consider only what is bad as being worthy of news. When the worsening of any condition (*e.g.*, a strike a cost-of-living rise, a corruption charge, etc.) is automatically front-page news, but a significant improvement in the situation gets little or no attention—one wonders about the balance of the average journalist's philosophy. The problem is not that it is wrong to expose error or malfeasance but that preoccupation with it—either by neglect of alternatives or by the very flamboyancy of the display—can profoundly affect what the public learns about developments of general interest. After all, the purpose of free press exposure is to *keep the people informed.* The tendency to ignore mundane news about how well things are going, in favour of what goes wrong, automatically gives a distorted image. It is the *misleading impression* that is every bit as dangerous to the general welfare as no news at all. Concentration on a fraction of events that reflect unfavourably on officialdom can lead to an extreme view that may not be justified. Even during the days of the Watergate exposures during the Nixon administration, few Americans and certainly far fewer non-Americans could see more than a picture of connivance, misrepresentation, and illegality in governmental operations. Never mind that the total performance of the administration in domestic and foreign affairs had by no means been a wholesale disaster. Never mind that the great mass of governmental processes were moving along with efficiency and honesty and care Never mind that *not one career civil servant* had even been *accused* of wrongdoing. The public was rarely even reminded of these realities by the news media. And Nixon had become so discredited that nothing he said—even when the facts supported him—was accepted at face value.

Control of the Media Newspapers and broadcasting stations are owned and operated by private interests in the United States Most Americans are dependent on a single newspaper for their news of current events. The fact is that the media may not have direct power in the sense that an elected or appointed official may have, but the media's performance certainly has consequences Even though the press may not initiate events or start major moves, its reporting clearly *affects* events. Yet, only a handful of influential men control both the reporting of news and the editorial opinions of the major media. Obviously, the protection of the broad public interest in these circumstances must rely on continued emphasis on a multiplicity of media outlets and on avoidance of over-concentration of ownership and control of press and broadcasting facilities

Access to the Media. Parallel to the foregoing point is the question as to how competing points of view get expression. Monopoly of the press and television in some localities makes access to these powerful instruments of vital importance. Is freedom of the press merely for those who happen to own the devices for dissemination? Does not the first amendment need a more positive interpretation so as to protect the right of readers and listeners to a full range of news and public opinion? Can we rely on the ingenuity of public

officials themselves or of others who know how to get press attention to round out the facts on some issue or event? Few public officials dare to offset what they consider misrepresentation, lest they incur the resentment of journalists and make matters worse in the future Certainly, however, few would suggest reliance on government issuances alone As one astute observer says:

> Making the media representative and giving expression to the intensely different voices among the American public will not be accomplished by substituting government control of the media for private control The responsibility for providing opportunity for expression belongs to both the governmentally and the privately controlled media [5]

CONCLUSION

Having the most detailed and perhaps the most reassuring information-access laws and systems in the world obviously does not guarantee that the United States has the problems of secrecy in democratic government solved Controversy and challenge continue. Tension between the media and officialdom remains almost as strenuous as ever It is what one must expect in a vibrant, generally well educated, society The problems are not different in kind from those existing elsewhere, only different in degree or, more accurately, in degree of refinement.

Apart from clearer definition and proceduralisation of access to government performance and materials, no mechanism has yet been invented to resolve the daily pull and tug between a free press and an ostensibly open government The press, encumbered by corporate control, by the compulsion for haste and to see mostly the bad side of things, and by the limitation of generalists trying to master the ever-extending range of complexities in the hands of government specialists, and the government, eager to see the best face put on its works and subject to the sometimes overwhelming strains of administering next-to-unmanageable programmes, will continue to be in an adversary relationship

Yet, government has had far more constraints placed on its behaviour than has the press Both conventional doctrine and judicial interpretation have barely touched the more subtle and difficult issues inherent in a free press No one has come up with the magic answers to how can we trust the press? how can we be sure it reports (or even sees) the whole picture? how can we assume its integrity and farsightedness any more than that of responsible, elected officials? No third party 'regulation' seems practicable In the long run, all we can count on is competition within and among the media themselves, the interplay between official and press views of issues and events, and, above all, an increasingly better educated and sophisticated population

[5] Jerome A Barron, *Freedom of the Press for Whom? The Right of Access to Mass Media* Bloomington, Indiana University Press, 1973, p 93 Mr Barron is an authority on constitutional law ☐

Executive Privilege : Recent Trends

P. M. Kamath

THE POST-WORLD War II Presidents in the United States, beginning with Harry S. Truman, have made increasing use of executive privilege in their administrations. What is executive privilege? What is its nature? What is its basis—constitutional or otherwise? What are the recent trends in its use in practice? It is proposed to discuss some of the answers to these questions in this paper.

Executive privilege refers to the modern Presidents' claim for an absolute right to determine what information in their possession they would share with the two other branches of the government.[1] Basically, it is a discretionary power to refuse to share information with the Congress. Such a presidential control over information is called the 'executive privilege.'[2] Raoul Berger, a noted critic of executive privilege, defines executive privilege as "the President's *claim* of constitutional authority to withhold information from Congress.. ."[3] Nixon's Secretary of State William Rogers, while he was the Deputy Attorney General in the Eisenhower administration, defined executive privilege as:

> the power of the President to preserve the integrity of his constitutionally assigned functions by withholding information the disclosure of which would impair the *process* by which the executive branch carries out those functions or would be contrary to the public interest.[4]

Executive privilege has to be distinguished from executive prerogative.[5] Executive prerogative, though claimed to be a concept as old as the organised government itself, has distinctly an imperial touch. The executive, in all forms of government, has claimed a degree of discretion to decide on the

[1]Though our concern in this paper is restricted to sharing of such information by the executive with the Congress.

[2]See Adam Breckenridge, *The Executive Privilege: Presidential Control over Information*, Lincoln, University of Nebraska Press, 1974, pp. 1-2.

[3](Emphasis added). *Executive Privilege. A Constitutional Myth*, Cambridge, Mass., Harvard University Press, 1974, p. 1.

[4]See 'Secretary Rogers Statement on Executive Privilege,' The *Department of State Newsletter*, August 1971, p 2.

[5]*The Oxford Dictionary* uses 'prerogative' and 'privilege' as synonymous

conflicting issues for which there are no answers in the existing law or conventions. Thus, executive prerogative is the power to act according to discretion without any legal prescription. According to the *Encyclopaedia Britannica*, "Prerogative in English law means the residue of discretionary power and legal immunities that are left in the hands of the Sovereign."[6] Executive prerogative has a sense of being inherent in the body of the crown. However, executive privilege is something granted either to a person or to a body of persons by the constitution or by the law or merely a *claim* of the executive. Executive privilege can be considered as 'an immunity or exemption conferred by special grant,'[7] on the executive branch of the government

CONSTITUTIONAL BASIS

Executive privilege, to be real, has to be 'conferred' by the constitution or the law What is the basis of executive privilege claimed by the modern US Presidents? The executive branch has been generally reluctant to base the claim of executive privilege on the laws passed by the Congress even when they permitted such withholding of information.[8] What the Congress has given through legislation it can take away any time [9] The executive branch has been looking for a more solid ground for its claim of executive privilege

Presidents since Truman have seen executive privilege "rooted in the constitution " But the constitution nowhere speaks of executive privilege The founding fathers were creating under the constitution a republic, not so much a democracy The constitution speaks of the "privileges and immunities of citizens,"[10] but not of the privileges of the executive Thus, in the Supreme Court hearings in Nixon's tapes case (*U S. vs Nixon*), on July 8, 1974, Justice William O Douglas told Jaworski, the Watergate Special Prosecutor. "We start with a Constitution that does not contain the words 'executive privilege' " [11]

Article II of the constitution vests the executive power in the President The proponents of executive privilege have asserted the President's exclusive exercise of the executive power as the basis to decide what information the executive could share with the Congress [12] But this seems to be a far fetched

[6]*Encyclopedia Britannica*, Chicago, Encyclopedia Britannica Inc , 1973, p 458

[7]*Encyclopedia Britannica*, Chicago, Encyclopedia Britannica Inc , 1961, p 438 L

[8]Congress in Several legislations provide for the withholding information from the general public See for details, Francis Rourke, *Secrecy and Publicity Dilemmas of Democracy*, Baltimore, The Johns Hopkins Press, 1961, pp 56-62.

[9]Joseph W. Bishop, Jr., "The Executive's Right of Privacy An Unresolved Constitutional Question," *The Yale Law Journal*, 66, No 4 (1957), pp 479-80

[10]See Art IV, Sec 2 and Art XIV, Sec. I.

[11]Quoted by Richard E. Cohen, "Court Hears Arguments on Extent of 'executive privilege,' " *National Journal Reports*, July 13, 1974, p 1058

[12]See "Executive Privilege" (Statement by President Nixon, March 12, 1973), *Weekly Compilation of the Presidential Documents*, March 19, 1973, p 253

solicitation of a basis for executive privilege, since the same Article of the constitution in Section 3 says that the President "shall take care that laws be faithfully executed." It is the Congress as a law making body and the judiciary as a law interpreting body who could oversee whether laws have been 'faithfully' executed or not by the President. In that process, if the Congress needs information, the President cannot deny it.[13] But any article or section is good enough for those who are determined to trace executive privilege to the constitution. Because, it has been claimed that since the President is charged with the duty of 'faithfully' executing the laws, in the process, he alone has the 'inherent' right to decide what information could be given to the Congress.[14] The President's oath of office also binds him to "faithfully execute the office of President "[15] In brief, the President alone has the executive power and he alone decides on matters relating to his executive powers.

That being so, executive privilege has been traced to an unstated but, nevertheless, underlying theory of the separation of powers which distinguishes the American form of government from the parliamentary form. Thus, William Rogers traces the executive privilege neither to any statute nor to any administrative regulation but directly to the "constitution itself and the design of the founding fathers for a separation of powers between the executive branch, the legislative branch and the judiciary."[16] The three branches are created equal and coordinate and one branch cannot force the other to do what it is not willing to do. Presidents have often, therefore, preferred to base their claim for unfettered discretion to exercise executive privilege on the doctrine of separation of powers.

The constitutional base for executive privilege is thus buttressed by combining together Article II of the constitution with the underlying doctrine of separation of powers Taken together it is argued that executive privilege is "inherent in the scheme of government created by the constitution."[17]

The courts have generally refused to decide on the question of executive privilege. There have been no specific court cases on executive privilege till 1973 Even where the question arose generally, the court decisions, as Joseph W. Bishop says, are not much illuminating because they "furnish no guidance as to the inherent right of the executive to withhold information from Congress "[18] However, in 1973, 33 Congressmen went to the Federal District Court, Washington D C., questioning the executive's right to deny them the

[13]For detailed discussion see Berger, *Executive Privilege,* pp 2-14.

[14]*Congressional Record,* 93rd Cong , 1st Sess , Vol 119, Pt 6 (March 13 1973), p 7414.

[15]Art I, Section. I

[16]"Secretary Rogers Statement on Executive Privilege," *The Department of State Newsletter*, August 1971, p 2

[17]Memorandum of opinion of Arnold, Fortas & Porter, "Immunity of a Confidential Administrative Assistant to the President from Compulsory Process of a Congressional Committee," February 17, 1964, FG-II-8-1/Staff Aides, Johnson Library.

[18]"Executive's Right of Privacy . ", *The Yale Law Journal,* pp 478-9.

information on the underground nuclear test at Alaska. Judge George L. Hart, Jr., refused to entertain the suit on the ground that "such a judicial determination would violate the separation of powers doctrine."[19] However, a year later the Supreme Court in *United States vs. Nixon,* 1974, said: "The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the constitution."[20] More enthusiastic protagonists of executive privilege find that such a privilege is widely used within the government not only by the President but by the legislature as well as the judiciary. Hence they prefer to call such a practice of withholding of information as "constitutional privilege."[21]

Historically, the exclusive right to decide whether or not to share information with the Congress has been claimed by Presidents ever since the inception of the republic. However, it was certainly not claimed in the doctrinaire sense of executive privilege. George Washington used, for instance, functional differentiation between the two chambers of the Congress as a safe device to refuse information. In 1976, for example, he refused to submit papers relating to the Jay treaty to the House of Representatives on the ground that they had no 'right' to the papers. However, he later made available those papers to the Senate.[22]

RECENT TRENDS

The details of historical incidents need not detain us here. But suffice it to say that such cases have been too few in between and hardly possess the strength of historical precedents. Executive privilege has been increasingly given currency since Eisenhower's administration first claiming it in the context of the McCarthy hearings in 1954.[23] However, it is difficult to agree when Arthur M. Schlesinger, Jr., says that, "no President or Attorney General used it before the Eisenhower administration."[24] President Truman had also used executive privilege. Truman, in fact, extended it to protect the President even after leaving the office. Truman in November 1953 refused to appear before the House Un-American Activities Committee and testify 'with respect to matters which occurred' during his tenure as President even though he had left the presidency. Of course, Truman did not call his claim as 'executive

[19]Richard E. Cohen, "Information Gap Plagues Attemp to Grapple with Growing Executive Strength," *National Journal,* March 17, 1973, p. 38?

[20]Quoted by Martin F. Richman (book review), "Executive Privilege The Myth Lives On," *Stanford Law Review,* 27 (1975), p. 490.

[21]"Department Discusses Powers on Providing Information ", *State Department Bulletin,* 67 (July 3, 1972), p. 32

[22]"Executive Privilege", Statement by Raoul Berge *Congressional Record,* Vol 118, No 100 (June 20, 1972), pp H. 5814-20

[23]*Ibid*, p H 5815

[24]*The Imperial Presidency*, Boston, Houghton M· in, 1973, p 159

privilege', but based his denial on the separation of powers[25] However, what is new in the claim to withhold information by the executive, since the Eisenhower administration, is that the claim has been based on some constitutional considerations and making their claim to be an *inherent* aspect of government. The Eisenhower administration also extended it to cover a wide range of subjects.

According to Raoul Berger the term " 'executive privilege' was not found in any dictionary of American politics before 1958".[26] According to Schlesinger's study the term 'executive privilege' was first introduced in the official language by William Rogers, the then Deputy Attorney General of Eisenhower, in 1958.[27] The use of executive privilege became so frequent in the Eisenhower administration that the Senate took an extra-ordinary step of refusing to confirm Lewis L. Strauss as the Secretary of Commerce.[28] One specific ground for the Senate action was his excessive use of executive privilege to withhold information from the Congress while he was the chairman of the Atomic Energy Commission (1953-58).[29] Arthur M. Schlesinger, Jr., has rightly put it: "The historic rule had been disclosure, with exceptions, the new rule was denial with exceptions "[30]

Executive privilege since the 1960s has also taken new dimensions The presidents have even seriously come to dislike speculation on the executive policies by journalists, Congressmen or the people. James B. Reston, for instance, came to know about the speech Johnson was going to make at the 20th anniversary of the UN and his plans to end the financial crisis faced by the international organisation. Reston had a column on it in the *New York Times*. Johnson was so furious on the leak of the information that he got the speech rewritten As Reston says, "The doctrine of 'no speculation' is something new in the catalogue of presidential privilege."[31]

The Nixon administration, however, went the farthest in its claim of executive privilege. The right to withhold information, at the most a customary traditional claim of the executive, was elevated to the status of a constitutional right during the Eisenhower administration. But during the Nixon administration it became an all-embracing, inherent, and self-evident right William H. Rehnquist, Assistant Attorney General stated, in 1971,

[25]See President Harry S Truman's letter to the Chairman of the House Un-American Activities. Breckenridge, *The Executive Privilege*, Appendix, pp 164-7

[26]*Executive Privilege*, p 1.

[27]*The Imperial Presidency*, p 159.

[28]Normally it is customary for the Senate to confirm the Presidential nominees for the Cabinet posts He is the eighth Cabinet nominee to be denied confirmation so far.

[29]*The New York Times*, 20 June 1959, p 8

[30]*The Imperial Presidency*, p 157.

[31]James B. Reston, "The Press, the President and Foreign Policy", *Foreign Affairs*, 44 (July 1969), 515.

about the Nixon administration's definition of executive privilege:

> The doctrine of executive privilege, as I understand it, defines the constitutional authority of the President to withhold documents or information in his possession or in the possession of the executive branch from the compulsory process of the legislature or judicial branch of the government.[32]

In 1973 Nixon's Attorney General, Richard G. Kleindienst, made the most sweeping claim of executive privilege. According to him none could appear before the congressional committees and testify "if President so commands."[33] He attempted to make impeachment a routine measure, what the constitution had provided as the extreme measure. As he said:

> ..if the President of the United States should direct me or any other person on his staff not to appear before a congressional committee to testify... he has the constitutional power to do so. .[34]

If the Congress were to be unsatisfied with presidential withholding of information, it could either cut off funds to the President or impeach him.

If Truman had extended the protection of executive privilege to the Presidents even after their retirement, Nixon extended the same benefit even to his staff aides. As he put it: "Staff members must not be inhibited by the possibility that their advice and assistance *will ever become a matter of public debate either during their tenure in government or at a later date.*"[35]

SECRECY AND EXECUTIVE PRIVILEGE

An important reason for the sudden growth in the use of executive privilege has been the compulsive need felt by the administrations for secrecy in the policy making process. The urge for secrecy was itself a product of the then prevailing political atmosphere of anti-communism and cold war. An important obsession with the Presidents was protecting secrecy of their policy making process.

[32]U S Congress, Senate, Hearings, the Committee on the Judiciary, the Sub-Committee on Separation of Powers, *Executive Privilege The Withholding of Information by the Executive*, 92nd Cong , 1st Sess. (Washington, D C GPO, 1971), p 27

[33]Congressional Quarterly, *Almanac* 29 (1973), 777.

[34]U S , Cong , Senate, Sub-Com on Intergovernmental Relations, Com on Government operations, sub-com. on Separation of Powers and Administrative Practice and procedure, com on Judiciary, Hearings, 93rd Cong 1st Sess *Executive Privilege Secrecy in Government, Freedom of Information*, Vol I (Washington, D.C GPO, 1973), p 30

[35]"Executive Privilege" (Statement by the President, March 12, 1973), *Weekly Compilation of the Presidential Documents*, 9 (March 19, 1973), 254.

In the 1960s there was a tremendous increase in the secrecy in the executive branch deliberations. Presidents Kennedy, Johnson and Nixon were excessively committed to preserve secrecy in their foreign policy making process. This commitment was reflected at all levels of the government and in all departments and agencies. As a result, secrecy has been so indiscriminatingly used that Robert Goralski is caustic when he says that until recently the US military classified even the amount of "peanut butter and toilet paper" purchased for the use of armed forces.[36]

In the Cuban missile crisis, for instance, the Soviet Union had all the advantages of secrecy in stealthily introducing atomic missiles in Cuba. But the US formulation of response to the crisis was not less shrouded in secrecy. Presidential advisers where almost competing with each other in maintaining utmost secrecy of the decision-making process. President Johnson also had conducted his Vietnam decision-making in such top secrecy that the planned escalation of the air and ground war in early 1965 was successfully kept a secret, so that the President could still maintain in public that he knew "of no far reaching strategy that is being suggested or promulgated", which would escalate the war.[37] The Gulf of Tonkin incident and the US response to it in 1964 was such a tightly held secret that the element of deception that formed the basis of it was not realised either by the Congress or the public for atleast three years. In the case of the complete bombing halt, ordered by President Johnson on October 31, 1968, the dissemination of the information was so tightly controlled that only four persons knew it in the State Department.[38]

A concommitant aspect of administrative secrecy is the administrative leaks. Normally, administrative leaks are caused by those who are opposed to a dominant point of view on a particular policy. Having failed in their efforts to make the President accept their view point, or being unable to reach the President through the regular official hierarchy, individuals with an opposite view point try to publicise the existing differences within the administration in an effort to win the support of the press, the Congress and the public for their view point.[39] It is an attempt to build up an outside coalition for a particular view point, to pressurise the President and his men in favour of their point of view. All the recent Presidents and their men were worried about the premature disclosure of their thinking through leaks. Presidents Kennedy, Johnson and Nixon made constant efforts to tightly hold the information which they thought to be secret, by restricting access and devising ways and means to prevent leaks. Benjamin Read who as the Executive

[36]"How Much Secrecy can a Democracy Stand?" *Lithopinion*, 7, No. 3 (Fall 1972), p 78.

[37]The *Pentagon Papers*, p 400

[38]*Transcripts*, Benjamin Read Oral History Interview, p. 11, Johnson Library.

[39]See Douglass Cater, *Power in Washington: A Critical Look at Todays Struggle to Govern in the Nation's Capital*, New York, Random House, 1964, p. 235.

Secretary in the State Department was in control of in-and-out flow of cables says that on the test ban treaty Kennedy had "almost pathological fear of press leaks."[40]

Of course, secrecy has been a part of the governments everywhere. The American constitution itself was born in secrecy. It was basically an aristocratic creation and generally secrecy is an attribute of aristocracy. Alexander Hamilton considered 'secrecy' as one of the virtues which made the executive eminently suited to conduct foreign affairs.[41] Ever since the inception of the republic, to some degree, the conduct of foreign affairs has been always shrouded in secrecy. The secrecy has not only given the President greater powers in foreign affairs than the Congress but allowed him to dominate foreign policy making process.

Yet the constitution nowhere specifically empowers the executive to exercise the power of secrecy. For the majority had their apprehensions of the executive leadership. They reposed their trust in the Congress and their leadership. Thus the constitution empowers the Congress alone to decide on the need for secrecy.[42] But the Congress has consistently refused to enact an official secrets Act, similar to the one Britain or India has. In the absence of such an Act, the US executive, under certain circumstances, has taken recourse to executive privilege.[43]

In a technical sense, a distinction between mere secrecy and executive privilege can be made. Secrecy operates within the administration as well as in the executive-Congressional relations Within the administration, secrecy manifests through a classification system such as 'confidential', 'eyes only,' 'secret' and 'top secret,' These, in fact, act as information limiting devices within the administration Several communications within the administration are made available to selected officials on a 'need to know' basis It is not that Presidents maintain secrecy vis-a-vis the Congress, but occasionally they have kept secrets even from their own advisers in the area of national security.[44] Often sensitive cables have been tightly held by a few top officials within the administration.

The administrative secrecy vis-a-vis the Congress also operates at two levels. The executive need to maintain secrecy from: (1) the general public and (2) the Congress itself. Thus the communications with secrecy classification do not necessarily mean that they are not made available to the Congress. Under the presidential charge of secrecy, such communications have been

[40] *Transcripts*, Oral History Interview, p 7, Kennedy Library.

[41] *The Federalist Papers*, New York, A Mentor Book, 1961, p 462.

[42] See Art I, Sec 5

[43] See "Bizarre Demise of Political Trial," *The Economist*, May 19, 1973, p 49.

[44] The former Secretary of Navy, James Forrestal, for instance, came to know of the US agreement with the UK on the use of atomic weapons only with mutual consent only after he became the Secretary of Defence in 1947; and that, not through the executive officials but through Senators Vandenberg and Hickenlooper. See John G Palfrey, "The Problem of Secrecy," *Annals*, 290, November 1953, pp 94-5.

occasionally shown to some Congressmen. The executive has also requested for closed sessions of the congressional committees whenever they have presented secret information to them. Often on major foreign policy crises, the Presidents have called the congressional leadership for a White House briefing or held secret consultations with relevant committees and leadership. In all such instances, while the congressional committees have shared secret information with the executive, it has been effectively withheld from the general public. What really differentiates executive privilege from secrecy is the underlying 'authority' of the President to say 'no' to the Congress for any kind of information, whether it bears administrative classification marks or not But the effect of secrecy and executive privilege is the same: withholding information from certain people within the government.

EXECUTIVE PRIVILEGE IN PRACTICE

Executive privilege has been exercised either by the President or by the officials of the executive departments. The latter types of claims by the officials might or might not be with the knowledge of the President. Adam Breckenridge does not consider it strictly as executive privilege, but prefers to call it as "subordinate claims of privilege."[45] The exercise of executive privilege can also take place at two levels. The executive might refuse to submit reports, documents or communications sought by the congressional committees. Secondly, the congressional committees might ask an official of the executive branch to appear before them and share the information they are privy to. But the official might refuse to do so claiming executive privilege. The executive privilege of both these kinds have been claimed by the recent Presidents.

How often has executive privilege been exercised by the Presidents—Kennedy, Johnson and Nixon? Normally the answer to the question can be an index to determine the seriousness of the growing threat of executive privilege becoming an iron curtain to "shut off crucial information from Congress and the people."[46] But not in the case of the exercise of executive privilege.

According to a study made by the government general research division of the Library of Congress on the use of executive privilege by the executive between 1961-1972, the Kennedy administration exercised executive privilege 13 times and the Johnson administration only thrice. The Nixon administration claimed executive privilege 11 times.[47] These instances in a span of twelve

[45]See *The Executive Privilege*, p. 58.

[46]Berger, *Executive Privilege* (preface), p vii.

[47]Of these, 5 cases in the Kennedy Administration and 2 in Johnson Administration relate to the refusal to provide governmental records, etc., while 2 and 1 case respectively in the Kennedy Administration and Johnson Administration relate to the refusal of witnesses to testify before the Congressional Committees. Congressional Record, Vol. 118, No. 100, June 20, 1972, p H 5820.

years' governmental activity are so few; however, it is significant to note that most of these recorded instances relate to foreign/national security affairs

First, the factual data does not help us because of the congressional deference to the President In the post-World War II period, 'national security' has been an all-silencing concept. If the President says that his advisers would not testify before a congressional committee on a foreign policy crisis or any other vital issue, the committee chairman dare not take recourse to submitting a formal, written request for the testimony of the concerned adviser or for the production of the relevant papers or information The aforesaid study also speaks of the difficulty faced by them in getting precise and specific information on such executive denials to submit information, since such requests are not normally put in writing [48] The committee can be accused of lack of patriotism if it asks the President's intimate advisers to provide information on a current crisis through their testimony. Then there is a practical consideration: if the President's national security advisers claim executive privilege and refuse to testify, securing compliance to the committee request is still more difficult. The Congress has to cut off funds or impeach the President Both are extreme measures and the Congress is most reluctant to exercise them [49]

Secondly, between 1961-1969 the Congress and the White House were both controlled by the Democrats. In such situations, the congressional deference to the President in foreign affairs becomes more than the usual A Democratic Congress is unlikely to tell a Democratic President to make him available for testimony, compel him to share information withheld by him or his office. This does not mean that there is a greater sharing of information under such situations. In other words, the question of executive privilege becomes more important, vocal and controversial, when the White House and the Congress are controlled by two different political parties as it happened between 1955-1961, during the Eisenhower administration, and between 1969-1974, in the Nixon administration Executive privilege was more often and more rigourously enforced in the area of scientific advice "when the executive and the Congress (were) controlled by different parties."[50] Hence, it is more an indication of political distrust and rivalry between the two parties controlling the two branches of government than mere lack of information.

[48]See Congressional Record, 92nd Congress, 2nd sess, Vol 118, Pt. 17, June 20, 1972, p. 21514. Also see *Congressional Quarterly Weekly Report*, February 10, 1973, p 294.

[49]Though beginning from 1967 Congress was actively opposed to the Vietnam War, it failed to cut off military appropriation See *Congress and the Nation*, Vol II, Washington, D.C , Congressional Quarterly Service, 1973, p 944. Similarly, though the House Judiciary Committee voted to recommend impeachment of President Nixon, it felt greatly relieved when Nixon announced his resignation.

[50]'Scientific Adviser,' Thomas E Cronin and Sanford D. Greenberg (eds), *The Presidential Advisory System*, New York, Harper & Row, 1969, p 54. The first two years (1953-54), during that Administration Congress was also controlled by the Republicans.

Thus, short of asking in writing for the testimony of the presidential advisers, from time to time the chairmen of the national security related committees, especially the Senate foreign relations committee, have informally asked, for instance, the national security adviser to appear and testify.[51]. They have also asked him to provide them the information relating to a particular crisis, through the State or Defence Department officials who have testified before them Often Congressmen have also expressed their regrets, distress and annoyance at the fact that the man really in a position to provide them information has taken shelter under executive privilege and their inability to get all facts relating to a crisis. Thus, for instance, participating in the debate over the Dominican crisis of 1965, Senator Joseph Clark, a senior member of the Senate foreign relations committee said:

> The. .witness who I think should have been called was McGeorge Bundy. . Mr. Bundy, in what I consider to be a disregard to the relevant precedents took refuge in executive privilege and refused to appear before the Committee. At one point he said he would come and have tea with us, but then he refused even to do that.[52]

WHERE DO WE END UP

Broadly, one can observe four trends of thought on the basis of executive privilege. (*i*) constitutional, (*ii*) constitutionally implicit, (*iii*) practical, and (*iv*) constitutional myth (non existence of executive privilege). Some, like Raoul Berger, have taken the stand that executive privilege is a constitutional myth.[53] Another extreme has been President Nixon and his spokesmen (during 1969-1974) who elevated executive privilege to the level of a constitutional doctrine. It is true that the constitution does not provide for specific privilege for the executive and in a narrow legal and constitutional sense it might be termed a 'myth'. Some others see executive privilege implied in the constitutional structure of the three branches of the government, more specifically the separation of powers. Senator Sam J. Erwin, Jr., (DNC), a constitutional expert, has gone on record saying that "executive privileges (sic) do exist in certain rare instances, and it's implied in the Constitution."[54] Even the efforts to trace it to the theory of separation of powers implicitly is also not too convincing Because, while the separation of powers might prevent any direct interactions between the President and Congress to secure executive accountability, it cannot be envisaged as preventing such interactions between the officials who perform executive functions and the

[51]Interview with Fulbright.
[52]*Congressional Record,* Vol III, Pt. 18, Sept 17, 1965, p. 24244.
[53]*Executive Privilege,* p 296
[54]Quoted in "Democrats Another Step Towards Congressional Clout", *Congressional Quarterly Weekly Report,* January 20, 1973, p. 67,

Congress. Hence, there is no *locus standi* to claim constitutionality to executive privilege.

But it is difficult to reject totally a President's right to withhold certain information from the Congress. Based on practical grounds, some are willing to accept the existence of executive privilege. The government's normal functioning needs some recognition of confidentiality, especially in the process of decision-making, which involves free play of changing, conflicting opinions and advice. It will be difficult to administer the affairs of the state, especially in the area of national security, if the congressional committee insists to know, for instance, what the presidential adviser whispered in the President's ears. It is also uncommon for the congressional committees to do so.

However, in the modern times, the doctrine of separation of powers has given place to "separated institutions sharing powers"[55] This would mean that the government has moved to become a "shared administration."[56] But the Congress should not go on a fishing expedition in the executive branch and the executive should not shut off the doors to the Congress whenever it needs some light. But whenever it has chosen to do so, for long it has been a matter of 'congressional dispensation' It is based on congressional comity[57] This is recognised by even those who, like Raoul Berger, reject altogether the concept of executive privilege[58] The congressional comity only means that in rare circumstances, the President could withhold information with an informal consent of the Congress[59] In this sense executive privilege might still be needed to protect some information in the area of national security, like defence and defence related issues. This is really a case to relate executive privilege functionally rather than to an individual. Executive privilege could still protect the subject matter and not the person. Even in a functional context, trying to defend national security through executive privilege and secrecy in the absence of congressional cooperation, is atleast partly self-defeating in purpose, because, arguments of secrecy and executive privilege merely help to intensify congressional determination to get the information.

Others on practical grounds do not object to extending executive privilege

[55]Richard Neustadt, *The Presidential Power The Politics of Leadership with Reflections* on Johnson and Nixon, 1960, New York, John Wiley & Sons, 1976, p 101.

[56]Robert G. Dixion, Jr, "Congress, Shared Administration and Executive Privilege," Harvey C Mansfield, Sr, (ed), *Congress Against the President*, New York, The Academy of Political Science, 1975, p. 126.

[57]See the comments of Rep Moorehead participating in the debate over his amendment to Treasury postal service and General Government Appropriations Bill on June 20, 1972, *Congressional Record*, 118, No. 100, June 20, 1972, p H 5813.

[58]See *Executive Privilege*, p 296

[59]See Norman Dorsen & John Shattuck, "Executive Privilege· The President Won't Tell," Norman Dorsen & Stephen Gillers (eds), *None of Your Business· Government Secrecy in America*, New York, The Viking Press, 1974, p 29.

to a small group of people serving the President as his staff aides. Senator Mansfield, former Senate majority leader (1961-1977), for instance, believes that the President "is entitled to have a few intimate advisers on the basis of absolute confidentiality who are not subject to (the) Senate confirmation." But he too would concede it so long as such aides "remain in close counselling relationship with the President" without any operational responsibilities.[60] Malcolm Moos who had served as Assistant to President Eisenhower also thinks that executive privilege has to be extended to the personal talks of the President with his cabinet members and staff aides. But he says "resorting to executive privilege too broadly is, and ought to be, a disturbing paradox...."[61]

Then in practical operation it is still likely that the congressional need to know, and the executive's need not to tell, might clash. When there is such a conflict between the congressional demands for information and the executive's need to exercise the privilege, William Rogers and other proponents of executive privilege say that the ultimate test is the public interest or the national interest or the national security.[62] On that, all are agreed. But the question is, who is to determine what is in public interest. It has been argued that the executive prerogative is absolute and the President alone could decide on the actions necessary to preserve national interest. It is this that is disputed. If any branch of the government could claim to represent the public interest best it is the Congress. In any case, when the disputed information is in the custody of the executive branch, it cannot be the judge of its own decision to withhold the information. There is really no constitutional answer to the question; but one has to go to the political arena for an adequate resolution of the conflict. If the President feels the disclosure would seriously affect national security, Congressmen are not the enemies of the nation. They are equally, if not more, concerned about national security risks. As a matter of fact over the hard issues of national security, like atomic energy, the Congress would not ask for information, normally it is the administration which has taken initiative to share information.[63] Thus, when security on legitimate grounds is necessary, there is no reason why "secret consultations with relevant committees and leaderships" should not be an answer rather than the resort to executive privilege [64]

[60]Quoted in 'Democrats . ', *Congressional Quarterly Weekly Report*, Jan. 20, 1973 p 68.

[61]See "The Need to Know and the Right to Tell Emmet John Hughes, *The Ordeal of Power*—A Discussion," *Political Science Quarterly*, 79, June 1964, pp. 171-3.

[62]Rep. Nixon quoted the letter from President Truman of March 13, 1948 where the President had justified withholding of information "in the interest national Security " *Congressional Record*, 80th Cong , 2nd Sess , 101-94, April 22, 1948, p. 4783.

[63]See John G. Palfrey, "The Problem of Secrecy," *Annals*, 290, November 1953, p 93.

[64]See Katzenbach, "Foreign Policy, Public Opinion and Secrecy," *Foreign Affairs*, 52, October 1973, 14.

In the ultimate analysis, the question of executive privilege is not so much a matter of constitutional principle (because all constitutional issues are political) but of the political needs of the exigency. Congressmen who have been critical of executive privilege have themselves exercised it when they came to occupy the White House. A typical case is that of Nixon. He had raised serious objections to President Truman's claim of executive privilege in 1948. In a Senate speech on April 22, 1948, he had said: "The point has been made that the President of the United States has issued an order that none of this information can be released to the Congress and that therefore the Congress has no right to question the judgement of the President in making that decision. I say that proposition cannot stand from a constitutional stand point.. "[65] During Nixon's Presidency he was asked at a news conference on March 4, 1971 whether he sees any limits on the exercise of executive privilege. He said: "The matter of executive privilege is one that always depends which side you are on." He not only in retrospect thought Truman was right in insisting upon it but executive privilege was "essential for the orderly process of government."[66] The Democrats become critical of the Republican Presidents exercising executive privilege, but under their own Presidents Kennedy and Johnson they have for far too dangerously long tolerated executive privilege and secrecy.

The privileged information is not always privileged. Even national security related material can be divulged or leaked if that helps to bring political benefits to the administration It is only a matter of who gets it, how much and when. Thus in foreign policy crises, where the decision-making has been successful, at least over a short range period, the White House and even the President would encourage the reporters to conduct an analysis of the decision-making giving a blow-by-blow account.[67] In such cases even the National Security Advisers were available to the reporters or even to academic scholars on a background basis This was, for instance, the case in the Cuban missile crisis. Similarly, not all leaks are caused by those who oppose the official view. Occasionally the Presidents themselves favour leaks of view points favourable to them.[68]

Executive privilege and secrecy have been quite handy to the executive to remove from any public discussion the most crucial foreign policy decisions

[65]*Congressional Record,* 80th Cong , 2nd Sess , Vol 94, Pt. 4, p. 4783.

[66]"The President's Press Conference on Foreign Affairs," *Department of State Newsletter,* March 1971, p 2.

[67]See Douglas Cater, *Power in Washington,* pp. 230-1.

[68]Memo, Charles Maguire to Robert E Kintner, December 8 1966 It says· "The President noticed a letter from a soldier named Gerald L Jordan in the DOD Monthly Report on Vietnam and (he wants Kintner) 'to leak it to Joe Alsop (and) get him to quote it in a story." WHC Files, FG 105, Department of State, July-December 1966, Johnson Library.

in the name of national security.[69] Often administrative secrecy has been used to conceal the administration lapses or dubious conduct by the officials.[70] Nixon said that it has been indiscriminatingly used by the lower officials to conceal bureaucratic mistakes or to prevent embarrassments to officials and administrations.[71] Then, executive privilege has been used by the Presidents and their top men in the executive branch to avoid political embarrassment to themselves and not to protect national security information.[72] Executive privilege has been also used to cover foreign policy failures and practice public deceptions [73] Increased use of executive privilege since 1961 has been necessitated by the successive failures suffered by the Presidents in foreign affairs. John K. Galbraith has observed that "secrecy is... occasioned by the intrinsically high failure rate...."[74] As Sen. Mansfield observed: "Once secrecy becomes sacrosanct it invites abuse."[75] In the ultimate analysis it destroys democratic process when it deceives the public and the Congress. It destroys,

[69]See Walter F. Mondale, "Restoring the Balance," *Center Magazine*, 7, No. 5, 1974, p. 31.

[70]For details see Rourke, "Administrative Secrecy," *The American Political Science Review*, 54, September 1969, pp. 691-92 Nicholas de Katzenbach, "Foreign Policy, Public Opinion and Secrecy," *Foreign Affairs*, 52, October 1973, p 10.

[71]"Classification and Declassification of National Security Information and Material Statement by the President," *Weekly Compilation of the Presidential Documents*, March 13, 1972, pp 543-4. A lighter side of the official secrecy is the fact that markings such as "eyes only", "top Secret", or "strictly confidential" are some ways to make the recipient of the memo to read it with atleast some seriousness

[72]*The Pentagon Papers* were denied to the Senate Foreign Relations Committee in the name of national Security. But when they were disclosed through a 'leak' it did not jeopardise national security, except causing personal, political embarrassment to the former officials of the Kennedy and Johnson Administrations. During the Eisenhower Administration for instance when Emmet Hughes published *The Ordeal of Power* based on the personal papers maintained by him while serving Eisenhower as an aide in the White House, the question was raised as to how could a President's Adviser exercise executive privilege to withhold information from the Congress and public and publish memoirs based on inside papers. See Malcolm Moos, "The Need to Know and the Right to Tell: Emmet Hughes, *The Ordeal of Power*—A Discussion", *Political Science Quarterly*, 79, June 1964, p 174. Similarly Haldeman in his book, *The Ends of Power* divulges that in the wake of the Sino-Soviet conflict of 1969. "There were several overtures by the Soviets for a joint venture in the surgical strike (against-China)". Based on his intimate, inside knowledge he also discusses the reactions of Henry Kissinger and William Rogers to the Soviet move. See Girilal Jain, "The 1969 Sino-Soviet Conflict A US version on Nuclear Threat," *The Times of India*, Bombay, February 23, 1978, p 8.

[73]The extreme use of executive privilege to cover up the criminal misdeeds by the White House Assistants and his own involvement in them, of course came during the Nixon Administration under that omnibus term—Watergate See *Newsweek*, December 2, 1974, pp 30-1. This is ironic, because, while those activities were going on, Nixon maintained that executive privilege will not be used as "a shield to prevent embarrassing information" being made available to the Congress See his statement on Executive Privilege, March 12, 1973, *Weekly Compilation of Presidential Documents*, March 19, 1973, p 254

[74]"A Decade of Disasters in Foreign Policy," *Progressive*, February 1971, p 36.

[75]*Congressional Record*, Vol 100, Pt. 3, March 10, 1954, p 2987.

politically, the President, as happened with Johnson and Nixon, in different ways.[76] Thus any use of executive privilege generates a congressional sense that the executive is seeking to hide some of its failures.

Thus, when the congressional committees perceive that there are unstated purposes and unpronounced reasons underlying a policy decision, they are likely to probe deeper into the information available in the executive pigeon holes The Congress is unlikely to be satisfied if the President exercises executive privilege. Rather, the exercise of executive privilege is considered as an indication that everything is not well with the executive branch Martin F. Richman, the former Deputy Assistant Attorney General (1966-1969) observes: "Conflict over executive privilege is generally a symptom of the existence of several political conflicts between the Congress and the President. . "[77] Political differences between the President and the Congress, the possibility of causing political embarrassment, and also exposing corruption, misdeeds and failures of the executive branch are also important forces which make the Congress to seek information or the testimony of an official. That is after all an important function of the Congress. Again, it is a matter of congressional perception of the role of a particular official in the process of decision-making that make them to insist on a testimony by him. Thus, for instance, it is only when the Congressmen perceive that the National Security Adviser has been influential or more influential than the Secretary of State in moulding the ultimate presidential decision, that they feel being denied the relevant information because of his immunity from congressional questioning.

Executive privilege, as Senator Mansfield said, cannot be 'all embracing '[78] It cannot be as Senators Sam Erwin and Edmund Muskie said 'eternal privilege,'[79] by covering the important and influential officials in the White House, while in office, and after they leave the office Especially, the extension of executive privilege to the important White House officials has really threatened to reduce executive accountability to the Congress to a meaningless concept That has distorted the essence of democratic government and informed citizenship Senator Robert C. Byrd (D.W.V) has rightly observed when he said that "the indiscriminate use of executive privilege can only serve to distort . and injure the credibility of the government "[80]

□

[76]Deceptive escalation of the Vietnam war ultimately forced Johnson out of the Presidential race in 1968 Deception, secret war in Cambodia and secret-violations of domestic laws forced out Nixon from the Presidency in 1974

[77]"Executive Privilege ", *Stanford Law Review*, 27, June 1975, p 503.

[78]*Congressional Record*, 93rd Cong , 1st Sess Vol. 119 Pt 6, March 13, 1973, p 7414.

[79]Quoted by Schlesinger, Jr., *The Imperial Presidency*, p 251

[80]*Congressional Record*, 93rd Cong, 1st Sess , Vol 119, Pt 6, March 13, 1973, p 7414.

Secrecy in Government in Australia

A. Hoyle

Totalitarian capitals apart, only official Canberra comes close to matching that special aim of furtive reticence which marks the Ottawa mandarins off from other men.[1]

THIS STATEMENT, although it was made in 1969, is still applicable to the operations of the Australian government a decade later. There has been a progressive diminution in reticence and secrecy in many other democracies but comparatively little change in Canberra or in the capitals of the various states. For an understanding of why Australian governments should lag behind the clear move to greater freedom of information it is necessary to have an appreciation of Australian history since European settlement began almost two centuries ago.

Four of the six original colonies in Australia, New South Wales, Tasmania, Queensland and Western Australia, were either established as settlements for convicts transported from the United Kingdom or later found it necessary to accept convicts for economic reasons. Understandably, the convict settlements were ruled autocratically by a governor, appointed by the crown and supported by troops and a small number of free officials who were separated from the convict mass by their freedom, their birth, their education and their training In the interests of safety, order and efficiency, the political and administrative activities of the governments were kept as confidential as possible.

In the early part of the 19th century there was a substantial influx of free settlers into the Australian colonies who brought with them a demand for the rights and privileges enjoyed by free citizens in Britain and for the end of convict transportation. Under pressure from the local press and a vocal minority of settlers, transportation was ended to most parts of Australia in the 1840s and there was a quick progression in democracy from advisory councils to the governors to full self-government in the 1850s. The responsible governments which were established were copies of the imperial government

[1]Report of the Royal Commission on Australian Government, Canberra 1976, Volume 2, p. 2.

in London, with the parliaments and the civil services adopting the conventions and methods of the Westminster system. This basic reliance on Westminster precedents and attitudes has continued largely unmodified to the present day, despite the federation of the colonies in 1901, a mass immigration policy and the replacement of membership of the British Empire with membership of the looser British Commonwealth of Nations.

A discussion of secrecy in government in Australia therefore needs to be seen against the background of an ex-colonial country which has complete independence and political freedom but still maintains much of the ethos and most of the methods and attitudes to government which were developed in Britain in the 19th and early 20th centuries.

The trained official hates the rude, untrained public.[2]

This well-known statement of Walter Bagehot is as true today in Australia as it was when he made it in Britain in 1867 and shows itself in the marked reluctance of officials—and ministers of state—to give more than the barest information to a literate, increasingly well-educated Australian community In Australia, governments at commonwealth, state and local level employ almost 25 per cent of the work force and they control almost all facets of national life. Despite this, all governments have introduced and maintained both formal and informal codes of behaviour which effectively prevent both politicians and civil servants from revealing most of the policies and decisions of government and how these decisions and policies have been arrived at.

Under the doctrine of the collective responsibility of the cabinet, ministers have always declined to reveal information on matters which were not their own responsibility or to comment on decisions of the government which they are not responsible for implementing. In Canberra conservative governments (which have been in office for most of the time since federation in 1901) have been successful in maintaining a high level of secrecy regarding cabinet decisions and how they were made. Labour governments have been noticeably less successful in keeping the secrecy of decisions and Labour prime ministers have been often unsuccessful in preventing important leakages of information to the media.

Australian ministers, at both federal and state level, have been concerned to maintain a close control over political and administrative information so that they can maintain freedom of action, unhampered by critical public comment and because, under the system of government, they are still held responsible for the policies and major decisions of their departments The doctrine of 'ministerial responsibility' has been eroded in recent times and there is little evidence that a minister's responsibility is now seen as requiring

[2] R Spann, *Public Administration in Australia*, NSW, Govt Printer, 1973, p 352

him to accept the blame for all the faults and shortcomings of his department.[3] However, ministers still have to face the possibility of embarrassing questions in parliament and from an importunate media and a controlled flow of information makes their job much easier. Press statements from ministers are a regular feature of Australian government but their usefulness in informing the public is very limited for they are usually concerned to maintain a favourable public image of the minister and rarely give the background information which is necessary in making an assessment of the value of the decision or decisions announced.

Cabinet documents in Australia are 'privileged' documents which are normally available only at the discretion of the government Recent events, in a long-running case brought by a private citizen against members of the previous Labour government, have shown that even the courts may not be able to obtain access to important documents which a government does not wish to produce or even to question senior civil servants whom the government of the day does not wish to give evidence.[4]

The deliberations of the major political parties in Australia are normally kept as secret as possible. The Liberal and Country Parties usually manage to keep their deliberations confidential, although at times disgruntled members will give their version of events and processes to the media. Fortunately for reporters and academics the details of meetings of the Labour Party are much better known. Despite constant efforts to prevent leakages of information, the activities of the Labour Party caucus are widely reported in the media. Journalists cultivate good relations with members who may be expected to talk and, as a result, most reports of caucus meetings, and reports of Labour Party policy decisions, are quite accurate.

In sensitive areas, involving national interest, such as defence and foreign affairs, information is often known to journalists through 'background briefing' by ministers or through information received from Australian and overseas sources. Such information is rarely revealed publicly before the government wishes. This is accomplished partly through the issue of 'D' notices which effectively (although not legally) ban the publication of the information, but more often through a sense of responsibility on the part of both journalists and editors and their realisation that if they publish this information they will be excluded from briefings.

Partly through the operation of quite severe libel laws, and partly through lack of a tradition, investigative journalism, of the type which exposed the Nixon administration in the United States, is not well developed in Australia. As a result, scandals involving politicians and administrators may continue for a long time before being revealed to the public. When such a scandal

[3]Report of the Royal Commission on Australian Government Administration, Volume 1, p. 60.

[4]The Sankey case in which a Sydney solicitor, Mr. D. Sankey, brought charges against four members of the Whitlam Government.

does finally emerge, Australian governments frequently take refuge in the device of a royal commission—usually headed by a judge—whose terms of reference are determined by the government of the day and may be so written that a minimum of information is released. Evidence to royal commissions is usually open but it may be given *in camera* and, on occasions, reports, when published, may be almost unobtainable by the public.[5]

Major policies may be made or approved by ministers but they are often generated by civil servants who, furthermore, usually have the responsibility for implementation. Australian governments have, ever since responsible government was granted, been concerned to completely control the information which civil servants may give to the public.

The Commonwealth Government, with wider areas of concern, has been particularly zealous in devising legislation to control the release of information but the state governments have not been far behind The prime instrument for the control of information from the federal government is the Crimes Act which lays down that:

1 A person who, being a Commonwealth Officer, publishes or communicates, except to some person to whom he is authorised to publish or communicate it, any fact or document which comes to his knowledge, or into his possession, by virtue of his office, and which it is his duty not to disclose, shall be guilty of an offence.
2 A person who, having been a Commonwealth Officer, publishes or communicates, without lawful authority or excuse (proof whereof shall be upon him), any fact or document which came to his knowledge, or into his possession, by virtue of his office, and which, at the time when he ceased to be a Commonwealth Officer, it was his duty not to disclose, shall be guilty of an offence.

The maximum penalty for a breach of the Act is imprisonment for two years [6]

This legislation is backed up by a regulation under the Public Service Act which makes it an offence for any civil servant to "use for any purpose, other than for the discharge of his official duties, information gained by or conveyed to him through his connexion with the Service".[7]

Further regulations[8] prohibit "disgraceful or improper conduct" and this has been interpreted as releasing information without authority and attacking the policies of the government concerning the enterprise of which the civil servant was a member.

[5] *e g* , the Report of the Royal Commission into the Suspension of Civil Administration in Papua was not published and only a few roneo copies exist.
[6] *Crimes Act* 1914-1973, Section 70.
[7] *Public Service Act* 1922-73, Regulation 34,
[8] *Ibid* , Regulations 55-56,

This rather draconian legislation has successfully inhibited most civil servants from breaching the secrecy of government administration but in recent years leakages of information—even in sensitive areas—have become a source of some embarrassment and occasional witch hunts in the bureaucracy. In practice a blind eye is turned to many technical breaches of the rules, but most Australian civil servants have no desire to break government rules on the secrecy of information. Junior officers are not usually in possession of much information of interest to the public and almost all senior officers are thoroughly imbued with the belief that the public should be told only what it has to know. Many of them believe that it is the responsibility of the minister to determine what information should be released[9] and it is probable that most ministers share this viewpoint.

Others believe that the widespread release of information, especially that showing how policy decisions were arrived at, would reduce their effectiveness because they would be much more circumspect and would commit much less to paper if they felt that what they wrote would be available for public scrutiny.

The common move in democratic countries for access to government information has been reflected in Australia by the public commitment of recent Commonwealth governments to freedom of information. The Whitlam Labour Government in 1972 pledged itself to a new policy of open government and the present Fraser Government is similarly committed. However, the natural reluctance of most ministers and senior public servants to move into a totally new situation and the difficulty of making a policy of free access work within the parameters of the Westminster model, have meant that there has been very slow progress.

The Royal Commission on Australian Government Administration in 1976 urged greater openness and freedom of access to information about government processes[10] but it declined to endorse or recommend a specific draft Bill A long running inter-departmental committee recommended that freedom of information legislation should not be concerned to authorise the release of material not lawfully available at present but to compel the release of much material that is now made available, if at all, at the discretion of individual ministers [11]

A Senate committee is currently studying the issue and has received advice from departmental heads that a statutory right to freedom of information would involve a considerable increase in the number of staff employed, would impose an extreme burden on ministers and permanent secretaries, and could force a new relationship between ministers and civil servants.[12]

[9]*R C A G.A Report*, Volume 2, p 3.
[10]*Ibid*, Volume 1, p. 350.
[11]*Ibid*, Volume 2, p. 169.
[12]*The Canberra Times*, March 15, 1979, *The Australian*, March 7, 1979.

The prospects for a quick passage of freedom of information legislation and a consequent release of government documents do not appear bright. As one of the Royal Commissioners wrote:

> There is reason to believe that... a commitment to secrecy will persist. It is self evident that administrative discomfiture can in many, if not most, circumstances be avoided by a prudent economy in making official information publicly available. Caution, anonymity and circumspection in releasing information which potentially could be put to hostile use, are reliable assets for any administrator who wishes to avoid controversy (and recrimination).[13]

The demand for the release of government information in Australia has not come from the public, which displays only a fitful interest in government, but from political parties which are currently in opposition, from the media, from academics in the social sciences and from a few special interest groups who suspect they are not being treated sympathetically by the minister or the bureaucracy.

On a more general level there remain many problems in overcoming secrecy in government in Australia. One of the more important, but less publicised, is the problem of obtaining information from statutory authorities The Commonwealth Government alone has some 170 statutory authorities with twice as many employees as there are in the 'career' public service Almost all of these authorities are required to issue annual reports. The reports are generally notable not only for their variety, but also for how late many of them are—some are up to four years late—and how little information they contain. The production of a 'glossy' report is offered by some statutory authorities in place of one containing detailed information about the goals, policies and procedures of the organisation. Most public attention has been centred in the freedom of information debate, on the policy making departments and little attention has been given to the failings of statutory authorities. This is all the more surprising as some authorities consume very large resources and, in at least one case, appear to dominate the government of the state in which it operates.[14]

The policy of secrecy in Australian government is not confined to current, or recent, activities but extends to activities more than a generation old Archives are not well developed in Australia and a great deal of important historical material has been destroyed. Where it is still available it is sometimes poorly housed and not easy of access Furthermore there is a general 30-year rule which ensures that researchers cannot expect to be given access to any records less than 30 years old. Even if records are 30 years old there are often considerable delays in obtaining them, as they must be processed to

[13] *R.C A G A. Report*, Volume 2, p 2.

[14] The Hydro Electric Commission in Tasmania.

remove any 'sensitive' records and departments may still forbid access to them.

It has been said that Australians have a talent for bureaucracy.[15] Equally it might be said that Australian governments have, through long practice, acquired a talent for secrecy.

It is a serious matter in a modern democracy to keep most of the operations of government largely secret from the public and even more serious that a sustained demand for openness of government has been so long in arising in a generally well-educated populace.

A general acceptance of government paternalism, fostered until recently by affluence, which made it possible to meet the demands of many special interest groups, and a general easy-going approach to life, may account for a general community acceptance of secrecy in government but it does not excuse the academic community, the media, and politicians for their lack of action.

The academic community, particularly that part of it which is concerned with the study of public administration and political science, has generally been able to carry on its work through the personal contacts of individual academics with politicians, senior public servants and experienced graduate and undergraduate students This method has the advantage of sometimes giving privileged access to information but is no substitute for a general opening of the activities of government to scrutiny and analysis. Education in public administration is generally undeveloped in Australia, not least because of the paucity of reliable information on and reviews of the policy-making activities of government.

In a similar fashion the media has generally been content to accept the ethos of secrecy in government and to operate through cultivating individual ministers and civil servants from whom it can regularly obtain unattributable information.

Politicians who aspire to ministerial office are unlikely to support demands for much less secrecy in government when it is clear that senior ministers feel that the maintenance of confidentiality is in both party political and governmental interests. Australian experience has shown that it is only politicians who are out of office or who believe that they have little chance of reaching ministerial rank who are likely to work for openness in government.

Secrecy in government in Australia, at both state and federal level is, as a result of a slow shift in community values, under increasing attack. The examples of how foreign governments have greatly reduced governmental secrecy have placed the proponents of secrecy on the defensive for the first time. But with an apathetic public, a long tradition behind it and, at best, only lukewarm support for open government from ministers and senior civil servants, Australian governments seem set to maintain secrecy—in fact if not in theory—for a long time to come.

□

[15] A.F. Davies, *Australian Democracy*, Longmans, 1958, p. 4.

Openness and Secrecy in British Government

Gavin Drewry

A WIDELY used textbook on British politics draws a sharp contrast between the 'liberal' assumption that the public has 'a right to know', and the 'Whitehall model of communication' which assumes information to be a scarce and costly commodity, not to be freely exchanged [1] The notion that attitudes towards openness in government can be dichotomised in this way is pervasive in political and academic discussion, but it imposes an artificial rigidity upon what is in fact a highly complex and elusive subject. It may even be downright misleading in encouraging a teleological approach—depicting a disjointed and often mundane debate as an epic struggle between forces of light and darkness, with every symptom of greater 'openness' being greeted as a milestone on the road of progress towards democratic enlightenment.

Such an implicit assumption has often been evident in speculation about the desirability and feasibility of achieving a more 'open' style of government that has been going on sporadically in Britain since the mid-1960s. The debate has been entwined with interminable arguments about reforming the apparatus of central, local and regional government, which in turn have been reinforced by a general atmosphere of gloom about the country's declining world status and its dismal economic performance. The same sense of crisis may have undermined the traditions of public deference and acceptance of hierarchy which, as the American sociologist, Edward Shils, argued in the relatively prosperous mid-1950s, have helped to underpin the 'unequalled . . secretiveness and taciturnity' of the British ruling class.[2] However, diminished national self-confidence may also have had the opposite effect of driving the bureaucrat still further behind his defensive 'bulwark of secrecy'.

The use of a phrase like 'open government' obscures the fact that the very concept of 'government' is an elusive one Reference is sometimes made to a British ruling 'establishment', with 'inner' and 'outer' circles of power-holders linked, albeit loosely, by shared language and manners of conduct.[3] The distinction between 'governors' and 'governed' is blurred

[1]Richard Rose, *Politics in England Today*, London, Faber and Faber, 1974, p. 211.
[2]Edward Shils, *The Torment of Secrecy*, London, Heinemann, 1956, p 49
[3]For example, Jean Blondel, *Voters, Parties and Leaders* (revised edn), Harmondsworth, Penguin Books, 1974, ch. 9

by the proliferation of 'quangos' and by the network of links (via government contracts, industrial development grants, etc.) between private and public sectors.[4] In discussing government secrecy, how far should we cast our net away from 'government' into the oceans of 'quasi-government' and even 'non-government'?

Moreover, the political debate about open government in Britain has often deployed a populist vocabulary which sets all kinds of traps for the unwary. Contemporary pluralism endows the word 'public' with a restricted meaning. A bureaucracy may be regarded as 'open' to the extent that it consults with its specialised 'publics'. Pressure groups are accepted as part of the democratic environment of decision-making, and some of them have also played an important part in achieving greater openness, notably in matters to do with the protection of the environment and with consumer safety. 'Participation in planning'[5] is still a fashionable phrase, and it has acquired some reality in such contexts as the debates about the need for and location of nuclear power stations, motorways and a third London airport.

Notwithstanding recent experiments (in unusual political circumstances) with referendums, a major argument for open government in its widest, populist sense, is to counteract the widespread apathy and ignorance that characterises British political culture. Introducing a recent White Paper on the reform of official secrets legislation (see below), the then Home Secretary, Mr. Merlyn Rees, was goaded by criticisms from his own backbenches into retorting: "When my hon. friend talks about people outside [parliament] being worried, I can only express the wish that at the election he finds more than two or three people in his constituency who are concerned about it."[6] This assertion may well accord with reality, but arguably it strengthens rather than diminishes the case for open government.

A British academic suggests that "there is little evidence of widespread public demand for more official information The fuss comes from some professional communicators and interest groups dissatisfied when governmental decisions go against them."[7] The problem of open government, if indeed it *is* a 'problem', lies very much in the eye of the beholder and in the standpoint from which he beholds. None of the limited range of people likely to have strong views about open government is likely to look at the

[4] D.C Hague, *et al., Public Policy and Private Interests*, London, Macmillan, 1975. Cutbacks in the number of Quangos and a drastic reduction in the scale of government intervention in the private sector are among the declared objectives of Mrs Thatcher's 1979 Conservative administration.

[5] *Viz.* the Report of the Skeffington Committee, *People and Planning*, HMSO 1969. See also Dilys Hills, *Participating in Local Affairs*, Harmondsworth, Penguin Books, 1970. For a recent analysis of the role of groups see J J. Richardson and A.G. Jordan, *Governing Under Pressure*, Oxford, Martin Robertson, 1979.

[6] H C Deb, 19 July 1978, cols 536-50, at 546-7.

[7] G.W. Jones, "What is Really Needed in the Debate on Open Government", *Municipal Review*, September 1977, pp 177-8.

subject with an open mind. 'Every bureaucracy', Max Weber tells us, "seeks to increase the superiority of the professionally informed by keeping their knowledge and intentions secret"[8]: why should the civil servant in Whitehall be peculiarly immune to this cast of mind? Ministers might be expected to absorb some of the values of the bureaucracies they command; but they are also parliamentarians, well able to understand, if not to share, the aspirations of the backbenchers that they themselves once were and may one day become again. Those outside the inner circles of government seek access to private knowledge and to the linguistic codes by which the members of the inner circle recognise their own kind. A recent journalistic expose of the secret network of cabinet committees (see below) quotes a former Whiteall economic adviser as saying: "In conversation, it helps Civil Servants to separate the ins from the outs. If I happen to quote the wrong name for the principal economic committee, then it shows I'm not an important fellow any more."[9]

No political journalist will admit to an aversion to open government; but his professional standing is enhanced by the continuing scarcity of the commodity in which he deals and by his continuing to be the only retail outlet. Every student of public administration (including the present writer) has a professional axe to grind about access to the raw material of his subject.[10]

Thus the debate about openness and secrecy in British Government is ramified, and is riddled with all kinds of potential pitfalls. The remainder of this paper will outline some recent developments in the subject in just a few of its numerous aspects.

THE OFFICIAL SECRETS ACTS

Legislators tend by definition to regard legislation as the primary means for effecting substantial policy changes. Consequently, much political discussion of government secrecy has centred upon shortcomings in criminal statutes directed against the improper revelation of official secrets. But the Official Secrets Acts also have a symbolic function which transcends their ostensible significance as devices for prosecuting alleged enemies of the state, their existence, in the absence of laws obliging public authorities to disclose information, means that the law's main contribution to the subject of official information has been a negative one.

[8] H. H. Gerth and C. Wright Mills (eds.), *From Max Weber*, London, Routledge and Kegan Paul, 1948, p. 233.

[9] Bruce Page, "The Secret Constitution", *New Statesman*, 21 July 1978, pp. 72-6, at p. 73.

[10] There has been recent concern about the 'weeding' of official documents due to be made available for study under the 30-year rule prescribed by the Public Records Acts 1958 and 1967. An official inquiry into the workings of the Acts was set up in August 1978 under the chairmanship of Sir Duncan Wilson.

by a crown servant. It includes all official documents and information. Section 1 is concerned with spying. The main offence created by Section 1 may be committed by any person who for a purpose prejudicial to the safety or interests of the state obtains or communicates any document or information which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy. Section 2 covers a much wider range of information than Section 1. Section 7 of the Act makes it an offence for any person knowingly to harbour a person who has committed or is about to commit an offence under the Act. Section 8 makes it mandatory that any person for an offence under this Act can be prosecuted only by or with the consent of attorney-general. In the case of Scotland, the consent of the lord advocate is necessary.

The Canadian Official Secrets Act, 1939[3] is closely based on British Official Secrets Act. The wording of Section 4 of the Canadian statute is almost identical to that of Section 2 of the UK Act. Prosecution can be launched in Canada for an offence under this Act only with the consent of the attorney-general. The maximum term of imprisonment under British as well as Canadian statute is 14 years.

The French penal code protects two classes of information: first, information affecting national defence and, second, information entrusted to certain persons by reason of their profession. Articles 72 and 73 cover the delivery of secret information to a foreign power. This is a treason if done by a French citizen and espionage if done by a foreigner. The penalty in each case is death. If a person who is responsible for secret information by reason of his function or status discloses it to an unauthorised person or to a member of the public or reproduces or destroys it without intending treason or espionage, he is liable under Article 75 to imprisonment for 10-20 years or for 5-10 years only if the offence was due to imprudence or inattention to rules.

The law of Sweden contains detailed *provisions governing*: (*i*) public access to official documents, (*ii*) the secrecy of official documents, and (*iii*) the freedom of the press. The provisions relating to (*i*) and (*iii*) have been incorporated in the Swedish constitution. The Secrecy Act sets out in considerable detail the classes of documents which are to be kept secret and the period for which the secrecy is to apply. A Swedish public servant who discloses a document which is required to be kept secret is guilty of a breach of official duty and can be prosecuted. The normal punishment in such cases is fine but imprisonment and removal from office can also be imposed in serious circumstances.

The American constitution and the criminal code deals with the freedom of the press, access by the public to certain information and the unlawful communication of specified kinds of information. Section 552 (b) enumerates 9 exceptions to the rule requiring government agencies to publish details of

[3]*R.S.C.* 1970, C 0-3.

their organisation, procedure and policies for public use. In addition to this, in the US, there are a number of enactments designed to protect specified kinds of information. The enactment of the most general scope is known as the Espionage Act which is applicable to all persons. Unauthorised disclosure by US public servants which are not covered by the Espionage Act can be dealt with by disciplinary sanctions.

THE INDIAN ACT

The Government of India in 1923 realised the difficulties and unsatisfactory state of affairs arising out of the simultaneous application of two sets of legislation in India. It was therefore decided to enact a law which was not only to be comprehensive but which should also incorporate the experience during World War II, specially in regard to the protection of military secrets. With this view the Official Secrets Act 1923[4] was enacted which was later on amended by the Central as well as State legislatures In 1951, certain minor amendments were made by the parliament Thereafter, for about 44 years, no amendments were effected. In 1967 the Union Government amended this Act with the view to widen the scope of Sections 3 and 5 of the Act. Secret official codes were brought within the ambit of the Act In a prosecution for an offence of spying under Section 3 of the Act, it was necessary to prove that the accused acted for a purpose prejudicial to the safety or interests of the state. It has now been provided by this amending Act that it would not be necessary to prove that the accused had committed an act which was prejudicial to the safety or interest of the state, if from the circumstances of the case or the conduct of the accused or his known character as proved, it appears that his purpose was a purpose prejudicial to the safety or interests of the state. This statute enhanced the punishment also

The word spying has not been defined in the Official Secrets Act but Section 3 has provided the penalties that can be inflicted to a person who is guilty of spying This section specifies the instances which constitute the offence of spying. It, however, does not give a comprehensive list of the instances which are to be considered as spying Under this section, if any person for any purpose prejudicial to the safety or interests of the state approaches, inspects, passes over and is in the vicinity of, or enters, any prohibited place, he is punishable for the offence of spying The term 'prohibited place' has been defined in Section 2 (8) of the Act It gives an elaborate list of places which are covered under this term. Another kind of spying which has been mentioned in Section 3(B) of the Act is that which makes drawing of any sketch, plan, model or note which is calculated to be or might be or is intended to be, directly or indirectly useful to an enemy. The

[4] Act XIX of 1923

term 'enemy' includes any unfriendly state or a potential enemy.[5] The third instance of spying in this section is where a person obtains, collects or records or publishes or communicates to another person, any secret official code or password or any sketch, plan, model, article or note of other documents or information which is calculated to be or might be or is intended to be, directly or indirectly useful to an enemy or which relates to a matter the disclosure of which is likely to affect the sovereignty or integrity of India, the sovereignty of the state or friendly relations with foreign states.

If the offence of spying is committed in relation to any work of defence, arsenal, naval, military or air force establishment or station, minefield, factory, dockyard, camp, ship or aircraft or otherwise in relation to the naval, military or airforce affairs of government or in relation to any secret official code, the guilty is punishable with imprisonment for a term of fourteen years. In other types of spying, punishment of only three years is to be given.

Sub-section 2 of Section 3 has clearly specified that the prosecuting agency, in cases of spying, need not prove that the act committed by the guilty was prejudicial to the safety or interests of the state. It will be sufficient if from the circumstances of the case or his conduct or his known character as proved, it appears that his purpose was prejudicial to the safety or interests of the state and the information obtained by the enemy was useful to him [6]

If a person who is charged for spying has been in communication with, or attempted to communicate with a foreign agent within the country or outside India, it will be sufficient to prove that his act and conduct is prejudicial to the safety or interests of the state

ACTS PREJUDICIAL TO THE STATE

The term 'foreign agent' for the purposes of this Act means a person who has been employed by a foreign power either directly or indirectly for the purposes of commiting an act prejudicial to the safety or interests of the state and a person shall be deemed to be in communication with a foreign agent if he has visited the address of a foreign agent or if the address of a foreign agent has been found in his possession.

The term 'official secret' has not been defined in the Act. The Bombay High Court in a case observed that the expression 'official secret' is ordinarily understood in the sense in which it is used in the Official Secrets Act and has reference to secrets of one or the other department of the government or the state.[7] Budget papers are official secrets, until the budget is actually presented in the legislature. Contravention of maintenance of its secrecy would amount to an offence. The fact that on a subsequent date the budget proposals have

[5] *Kutubuddin Vs State AIR* 1967 Rajasthan 257-258=1967 Cr L J 1700
[6] Section 4 of the Indian Official Secrets Act.
[7] *R K Karanjia Vs Emperor*, AIR 1946 BOM 322

to be made public would not detract from the secrecy of these proposals till such time as they are announced in parliament.[8] The Kerala High Court in another case held that budget papers are official secrets which cannot be published until the budget is actually presented in the legislature and the contravention of the same would amount to an offence under the Act.[9]

The disclosure of the government departmental examination papers constitutes an offence under Official Secrets Act.

"Recently three high ranking Pakistani intelligence officials masquerading as diplomatic corps personnel posted at the Pakistan chancery here carried out dangerous espionage operations, securing through blackmail secret codified documents revealing IAF squadrons striking power.

"The codified documents secured by intercepting 'classified mail' revealed strategic locations of IAF squadrons, their striking power, allotment of MI-S helicopters and AN-12 aircraft, flight timings and senior officers' 'positions' at air force stations and in the Defence Ministry. The IAF man maintained till the end that he never knew that the three Pakistanis were Pakistani intelligence officers.

"He was sentenced to 10 years rigorous imprisonment early this month by the Additional Sessions Judge of Delhi Shri P.L. Singla under Sections 3 and 5 of the Official Secrets Act 1923 read with Section 120B of the Indian Penal Code."[10]

In August, 1978, an Indian army officer holding the rank of Lt.-Col. had been arrested on charges of having traded military secrets with a Pakistan agency across the actual line of control, according to official sources.

The officer, who headed the Indian military intelligence wing in Kashmir, has been accused of having prepared a 20-page document which was seized at a place in western Kashmir last month, the source said.

Described as highly classified, the document contained 'complete information' about the strategic and operational strength of the Indian army in the northern command.[11]

Section 5(1) of the Official Secrets Act is very comprehensive in its nature It applies not merely to government servants but also to all persons who have obtained secrets in contravention of the Act. Regarding Section 5(4) of the Act and Section 4(1) of the Press (Emergency Powers) Act together, an invitation to the public contained in an article or advertisement in newspapers, to send official secrets to the editor of a newspaper for payment, comes within Section 4(F) of the Press Act as well as Section 5(1) of the Official Secrets Act It is really an invitation encouraging and inciting any person to commit an offence [12]

[8]*Nandlal More Vs State*, 1965 (1) Cr ...393 at 408

[9]*State of Kerala Vs K Balakrishn...* Kerala. ILR 1960 Kerala 1088 to 1091

[10]*Hindustan Times*, September 30,

[11]*Hindustan Times*, August 29,

[12]*R K Karanjia Vs Emperor*, A... at 324=Cr. L J 744

NON-BAILABLE OFFENCE

Offence under Section 3 of the Official Secrets Act is not bailable while offence under Section 5 is bailable. In a case where an accused was charged for an offence under Section 3 while others were being prosecuted under Section 5 of the Act, a controversy arose whether the accused charged under Section 3 of the Act should also be granted bail because the other accused were being granted bail on the basis of their charge under Section 5 of the Act. The matter went upto the Supreme Court where the controversy was finally settled.[13] In this case, the accused was a former captain of the Indian army and at the time of arrest was employed in the delegation in India of a French company. He, along with two others, was prosecuted for conspiracy (S. 120B of the Penal Code) and also under Section 3 and 5 of the Indian Official Secrets Act, 1923. The case against the three persons was that they in conspiracy had passed official secrets to a foreign agency. The two other persons were allowed bail. On rejection by the sessions judge of his application for bail, the accused applied to the High Court under Section 498 of the Criminal Procedure Code. The High Court was of the view that at that stage the question was arguable whether the accused had committed an offence under Section 3 (non-bailable) or under Section 5 (bailable). Consequently the High Court took the view that as the other two persons prosecuted along with the accused had been released on bail, the accused should also be released, particularly as it appeared that the trial was likely to take a considerable time and the accused was not likely to abscond. The High Court, therefore, allowed bail to him as well. On an appeal by the state, the Supreme Court observed as follows:

1 That in dealing with the application for bail before it on the assumption that the offence might fall under Section 5, the High Court fell into an error, as it should have considered the matter, even if it did not consider offence was under Section 3 or Section 5, on the assumption that the case fell under Section 3 of the Act.
2. That the only reasons which the High Court gave for granting bail in this case were that the other two persons had been granted bail, that there was no likelihood of the accused absconding, he being well-connected, and that the trial was likely to take considerable time. These were, however, not the only considerations which should have weighed with the High Court if it had considered the matter as relating to a non-bailable offence under Section 3.
3. That among other considerations, which a court has to take into account in deciding whether bail should be granted in a non-bailable offence was the nature of the offence, and if the offence was of a kind in

[13]*State Vs Capt. Jagjit Singh*, AIR 1962 SC-253

which bail should not be granted considering its seriousness, the court should refuse bail even though it has very wide powers under Section 498 of the Code of Criminal Procedure.

4. That as the case against the accused was in relation to the military affairs of the government, and *prima facie* the accused if convicted would be liable up to fourteen years' imprisonment under Section 3, in such circumstances considering the nature of the offence, it was not a case where discretion, which undoubtedly vested in the Court under Section 498 of the Code of Criminal Procedure, should have been exercised in favour of the accused

Later, the Rajasthan High Court went to the extent of observing that bail applications under the Act should be dealt with on the basis of assumption that the offence alleged against the accused is one under Section 3 [14]

The Official Secrets Act does not provide only for the punishment to an offender who has leaked out secrets to unauthorised persons but it also lays down provision to punish a person who harbours any spy. Section 10 of the Act says that if any person knowingly harbours any person whom he knows that he is about to commit or who has committed an offence under Section 3, knowingly permits to meet or assemble in any premises in his occupation or control any such person, he should be guilty of an offence In fact, the section casts a duty on such a person to give on demand to a police officer any information in his power relating to such a person and if he fails to furnish any such information he shall be guilty of an offence under Section 10

Scope of the Official Secrets Act 1923 is not confined to leakage of secret information or contents of confidential documents, etc , to unauthorised persons, but it extends to making of unauthorised use of uniforms, falsification of reports, forgery, impersonation, and false documents as an offence. In addition to this, it has been provided in this Act that no person in the vicinity of any prohibited place shall obstruct or interfere with any police officer or any member of the armed forces engaged in guard, sentry, patrol or similar duty in relation to prohibited place. If any one contravenes this provision he is liable to be imprisoned which may extend to three years or fine or with both [15]

JUDICIAL COMPETENCE TO TRY

Every court of law cannot try an accused who is alleged to have committed an offence under the Official Secrets Act. It has been prescribed that no court other than that of a magistrate of first class, specially empowered in this behalf by the appropriate government, which is inferior to that of a district

[14] *Rutubbudin Vs State*, Air 1967 Raj 257 at 258=1967 Cr L J 1700
[15] Section 6 of the Official Secrets Act, 1923

or presidency magistrate shall try an offence.[16] In terms of Section 13(2) it is not necessary that every case involving any offence under the Act is to be submitted by the magistrate to the sessions court by way of routine. In fact, the magistrate has to examine whether there is a *prima facie* case against the accused. If there is no *prima facie* case the accused is to be discharged. If in a particular case the accused is not interested for an enquiry by the magistrate, the latter may dispense with the inquiry and order for the committal of the case to sessions court.[17] If the prosecution submits an application to the court trying the accused under this Act saying that the publication of any evidence to be given or of any statement to be made in the course of the proceedings would be prejudicial to the safety of the state and all or any portion of the public should be excluded during any part of the hearing, the court may make an order to that effect. The Act, however, makes it obligatory on the court to pass the sentence in public.[18] The Supreme Court has observed that it would be noticed that while making a specific provision authorising the court to exclude all or any portion of the public from a trial Section 14 in terms recognises the existence of such inherent powers by its opening clause.[19]

It is possible that an offence under the Official Secrets Act may be committed by a company. In order to identify the person of such a company who is to be punished for the offence, it has been provided in the Act that the person who is in charge of and is responsible to the company for the conduct of the business of the firm is deemed to be guilty of the offence and such a person is liable to be proceeded against and punished accordingly. If the person as proceeded against proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such an offence, he will not be guilty of the offence.

If the offence has been committed by the company and is proved that the offence was committed with the consent or connivance or due to negligence of any director, manager, secretary or any other officer of the company, such an officer shall be deemed to be guilty of the offence and shall be liable to punishment under the law [20]

The Official Secrets Act is applicable throughout the territory of India but the Jammu & Kashmir Government has promulgated the Enemy Agents Ordinance. Two Indians were found guilty of spying for Pakistan and were awarded rigorous imprisonment for a specified period in terms of this ordinance by a Jammu court recently One of the accused was nabbed while he was trying to cross the border into Pakistan carrying documents contain-

[16]Section 13, *op. cit*
[17]*R.S Diwakar Vs. State*, AIR 1950 AIR 325=1958 Cr L J 585
[18]Section 14, *op cit.*
[19]*Naresh Vs State of Maharashtra*, AIR 1967 SC 1.
[20]Section 15 of the Official Secrets Act.

ing information of strategic importance about Kashmir[21]

After studying the important provisions of the Official Secrets Act the question now arises whether such an obstructive piece of legislation should be allowed to continue in our statute book specially in view of the democratic structure of the government of the country. As stated above, the public at large is always desirous to know the reasons behind administrative decisions which directly or indirectly affect their social life Members of state legislatures and parliament as the representatives of the masses have tried to control the policies and activities of the government They exercise such a control through their questions and debates in legislatures. MPs, MLAs and MLCs have been influencing the decisions of the government while functioning as members of various committees constituted by the government or a House of the legislature. As members of the committees they get an opportunity to know various secret matters which they might not have as public men. It is also possible that they may be able to know the contents of documents revelation of which would have amounted to an offence under the Act. All these facts create doubt regarding the desirability of continuance of such a statute There have recently been several discussions in countries like USA and Canada which have raised this issue under various guises· administrative secrecy, the citizen's right to know, access to government files, freedom of information and so on. All these discussions arrive at the same conclusion, namely, greater and freer access to governmental information is desirable. In spite of such conclusions at various seminars attended by politicians, academicians and jurists no concrete step has been taken in these countries to loosen the grip of administration over the so-called secrecy being practised in the name of security of the state In this connection I may discuss a case decided by the Canadian Federal Trial Court in the near past[22]

The relevant facts in this case were that one Louise Joseph Rossi working as an inmate at the maximum security Archamalault Institution in Ste Anne des Plaines, Quebec, wanted his transfer to a medium security institution but this was refused on the ground that a number of warrants issued against him were outstanding. Rossi requested the authorities to allow him to see the concerned documents and files He was not allowed because they were treated to be secret, and directive No 2471(1) of the Canadian Penitentiary Service prohibited inspection of such documents. The court dismissed the petition saying that a writ of mandamus lies only to secure the performance of a public duty. It does not lie to compel performance of a mere moral duty In the present case the concerned authority was not bound to show the files to the petitioner Even if the government was bound to show the files, the writ could not be granted because it was a discretionary remedy and in the circumstances of the case the court was not inclined to accept the contention of the

[21]*Hindustan Times*, September 30, 1979

[22]*Rossi vs The Queen*, (1974) FC 531 (FCTD)

petitioner as he was aware of the warrants outstanding against him and the reasons for which they had been issued. In addition, he had been verbally informed about the nature of the warrants. Regarding the validity of directive No. 2471(1) the court held that there was nothing contrary to the Canadian Bill of Rights or any abuse of natural justice in the directive which had been issued under an Act. Contents of confidential papers could not be disclosed for security reasons.

This decision was a pointer to the authority, control and discretion exercised by administrative agencies in keeping certain documents secret and restraining the citizens from knowing their contents held to be vital for them. In spite of this decision and public opinion against it, the Government of Canada has not changed its attitude and has allowed the Official Secrets Act, 1939 to continue in force.* The directives issued by the different government agencies are also in operation.

CONCLUSION

There is no doubt that the public should be actively associated in the process of decision-making by the government but at the same time it cannot have access to confidential or secret matters, the divulgence of which may not be in the interest of the country. Maintenance of secrecy covered under the Official Secrets Act seems to be necessary from the point of national security and safety. The view that in a democratic country statutes like the Official Secrets Act has no place cannot be supported on any ground No country can afford to keep all its cards open at the risk of the nation's security. Democratic countries like Britain, USA and Canada still keep their statutes relating to official secrets alive. The offences and punishments provided in the Indian Official Secrets Act are almost similar to those of the British, Canadian and American statutes As stated earlier, in these countries there has been a growing feeling as well as demand for making more and more government files available to the public so that government's wrong decisions could be exposed, but the Official Secrets Acts in these countries have not been repealed I am of the opinion that our country should also continue to have the Official Secrets Act to protect the secrecy which is necessary for the safety and security of the country. The government should not, however. hesitate to place the facts which are not covered under the Official Secrets Act before the public to establish their impartiality, honesty and sincerity in administrative decisions.

□

*A liberalising Bill has been introduced in the House of Commons Since—Ed

The Modern State and Administrative Secrecy : A Case Study of India

C.P. Bhambhri

IN RESPONSE to the growing challenges of modernisation, the states in industrialised countries have established a complex network of institutions for governance and conflict management Max Weber had clearly observed the trend of governmentalisation and bureaucratisation of the advanced capitalist societies and he had stated that:

> Under modern conditions, the only alternative to administration by officials who possess such knowledge is administration by dilettantes [1]

Max Weber's scholarly insights inspired Morstein Marx. Dwight Waldo, Emmette Redford and Gunnar Myrdal to analyse the problems of 'administrative state' in the western countries Redford observes:

> Basically, the administrative state exists because there are shared needs that cannot be taken care of—either at all or in the scope and in ways that are considered satisfactory—without the continuing activity of public organizations. It expands because our numbers, our proximity, our expectations, our society's affluence, and our capabilities for personal realization through joint action to meet shared needs increase in the complicated, technological civilization in which we live.[2]

A rational and predictable human behaviour is possible if it is controlled and regulated. The administrative state performs the role of regulation of human behaviour by rational rules and code of conduct which are extremely comprehensive because the complexity of society demands it. The administrative state has raised problems of democratic control over administrators and a legitimacy of governmental interference in private lives of citizens; but the

[1]Reinhard Bendix, *Max Weber. An Intellectual Portrait* New York, Doubleday of Company, Inc , 1962, p 451.

[2]Emmette S. Redford, *Democracy in the Administrative State*, New York, Oxford University Press, 1969, pp 179-80

trend is towards more state regulation and not the minimal state.

The modern state in third world countries was established by the colonial rulers who needed a highly centralised and ruthless repressive machinery for exploitation. The colonial state was based on coercion, repression and secrecy, and supremacy of rulers was legitimised by terror and rule by persons About the colonial state, Gunnar Myrdal observes:

> From the colonial regimes. they have inherited much of the regimentation, red tape, and petty bureaucracy with which the metropolitan powers ruled foreign peoples of inferior status.[3]

India, like any other erstwhile colony, inherited a powerful system of governance from the British In the post-independence phase of development, the inheritance was further strengthened to meet the challenges of modernisation and economic planning. The modern Indian state has revealed many contradictions because it has not been able to resolve the conflicts generated by its colonial legacies and the demands of a democratic and free society. A few specifics of the Indian state may be referred to in order to understand the role of administrative secrecy and its threat to democracy:

(*a*) The colonial bureaucracy has left a great impact on the Indian administration because the colonial state was not smashed.

(*b*) The demands of economic planning have led to a proliferation of administrative agencies and functionaries which have not been able to evolve a model of administration different from their colonial inheritance.

(*c*) During the last thirty-two years, social conflicts have increased and the Indian state has strengthened its coercive apparatus to confront the challenges of emerging social classes.

(*d*) Colonial legacy, proliferated bureaucracy and coercive instruments have to operate under democracy, legitimacy and popular control in India. The Indian state has been attempting to reconcile democratic legitimacy and coercion in dealing with the problems of development and social change.

The above mentioned specific features of the Indian state reveal the complexity of the problems The major hypothesis of this paper is:

Administrative Complexity Helps Secrecy which is Misused After Attaining Democratic Legitimacy

A few pertinent questions could be raised in relation to the nature of

[3]Gunnar Myrdal, *Beyond The Welfare State. Economic Planning and Its International Implications*, New Haven. Yale University Press, 1968 (6th ed), p 14.

complex states and administrative secrecy.

1. What is the relationship between administratively sensitive ministries/departments and secrecy?
2. How does administrative secrecy help corruption and lobbying?
3. Does administrative secrecy create hostility between the politician and the civil servant? Does administrative secrecy lead to a reversal of roles of policy makers and decision makers?

A discussion on the problems and nature of administrative secrecy in India should be conducted in the light of the specifics of the Indian state, and relationship established between administrative complexity and secrecy. Such a discussion would be around the ministries of External Affairs, Home Affairs and Defence. The three ministries between them maintain secrecy because they deal with complex administrative matters of paramount public importance In the name of public security, law and order and safety of the country, these three ministries legitimise administrative secrecy. They reveal little to public scrutiny because, according to them, public interest demands secrecy. But if sensitive and important ministries are jealous of their administrative secrets, its consequences for democracy can be disturbing. Before we examine this further, it would be appropriate to spell out the main functions of the three ministries and relate them to the need for administrative secrecy felt by them Then it will be seen that the walls of administrative secrecy built by these three ministries are likely to encourage lobbying, corruption and insularity from democratic control

Role of the Ministries of Home, Defence and External Affairs in India

The prevalence of administrative secrecy in the three ministries is legitimised because they perform crucial and critical functions for the survival and security of the country. How can many aspects of treaties, agreements and understandings among various nations be exposed to public scrutiny? How can a country be defended against foreign invasions without secrecy? Preparations for defence of a country require secrecy and intelligence services. How can the whole administrative network of defence operate under public exposure? The openness in defence strategies helps the enemy, and secrecy is maintained both from the enemy and the citizens of the country.[4]

The Ministry of Defence is concerned with national security, and it functions in close cooperation with the Ministries of Home and External Affairs. The expenditure on defence is 3 per cent of India's GNP, and P V R. Rao laments that the expenditure on defence fell from over 30 per cent of the Central budget in 1950-51 to 15 per cent in 1961-62[5] After the Sino-Indian

[4]See, P.V R. Rao, *Defence Without Drift*, Bombay, Popular Prakashan, 1970
[5]Rao, *op cit*, p 5

border dispute of 1962, the Government of India raised its budgetary grants for defence preparations, and the Indian public approved it enthusiastically.

TABLE I DEFENCE EXPENDITURE

Year	*Total defence expenditure (Rs crores)*	*Total expenditure of Govt of India (Rs crores)*	*Gross National Product (Rs. crores)*	*Defence expenditure as percentage of total Govt. expenditure*	*Defence expenditure as percentage of gross national product*
1964-65	806	2,603	21,113	31 0	3.8
1965-66	885	2,720	21,856	32 5	4.0
1966-67	909	3,217	25,250	28.3	3.6
1967-68	968	3,148	29,612	30.7	3 3
1968-69	1,033	3,140	30,293	32.9	3.4
1969-70	1,101	3,590	33,521	30.7	3 3
1970-71	1,199	4,120	36,654	29 1	3.3
1971-72	1,525	5,498	39,194	29 1	3 9
1972-73	1,652	498	43,159	30.0	3.8
1973-74	1,681	5,845	53,704	28 8	3.1
1974-75	2,112	74,423	63,203	28.5	3.8
1975-76	2,472	9,429	64,996	26 2	3.8
1976-77	2,563	10,291	69,047	24.89	3.7
1977-78(RE)	2,752	12,081	n.a.	22.8	n a.
1978-79(BE)	2,945	13,679	n a.	21.5	n a.

RE· Revised estimates.
BE· Budget estimates
n a.· Not available.
SOURCE India, 1979, p 36

The result of increased expenditure on defence is that the Ministry of Defence has become a very complex and secretive organisation with a China wall around it.

The formal mechanism of defence policy for the country is based on the principle of pre-eminence of the political and democratic elements over the military perspective.[6]

The formal relationship of the politicians and the military generals does not give a true picture of the inner dynamics of the functioning of the Defence Ministry. A defeated nation was very critical of the Indian leadership in 1962, and the military generals escaped criticism by writing books in their defence.[7]

[6]See, A L Venkatesaran, *Defence Organisation in India · A Study of Major Developments in Organisation and Administration since Independence*, New Delhi, Publications Division, Government of India, 1967.

[7]See: B.M. Kaul, *The Untold Story*, Bombay, Allied Publishers, 1967 and J P. Dalvi, *Himalayan Blunder: The Curtain-raiser to the Sino-Indian War of* 1962; Bombay, Thacker, 1969.

Because of secrecy in the functioning of the Defence Ministry, the blame for 1962 cannot be fixed, and a few implications of the nature of defence administration can be highlighted They are:

(*a*) Since defence of a country is a very sensitive area of public policy, its functioning is shrouded in mystery.
(*b*) The Ministry of Defence operates under national and international lobbying in its day to day activities. The domestic public opinion must support growing defence expenditure in India, and the mass media has to be extensively used for favourable public support to defence policies and programmes of development It is natural that lobbies for defence expenditure operate within and outside the parliament Further, India has to buy a lot of sophisticated defence equipment in foreign markets which are subject to a lot of competition and pressure Many technical and political considerations are involved before purchasing defence equipment. The powerful lobbies of military-industrial complex of the developed countries operate and compete in the third world, and India is no exception to this general rule Many controversies have been raised in the public about defence purchase, and because of the secrecy of technical advice, many a time rumours have the field day.

A brief resume of the functions of the Home Ministry would reveal its central role in the governance of the country. The maintenance of peace and public tranquillity is the main function of the Ministry For performing these functions, the Ministry is responsible for public services and police and para-military organisations of the Central Government. The Ministry overviews the State Governments and their administrative and police forces for the maintenance of law and order in the country.[8]

The Ministry has repeatedly acknowledged its coordinating functions with the State Governments, and its emphasis on the modernisation and streamlining of apparatus to maintain law and order In its annual report (1969-70) the Ministry mentioned that.

> The trend towards the growth of tension and violence in the country continued and the Ministry of Home Affairs was engaged not only in taking appropriate administrative measures in consultation, where necessary, with State Governments, but also in examining the socio-economic forces that lead to such tensions and violence [9]

[8]For details See· *The Organisation of the Government of India*, Delhi, Somaiya Publications Pvt Ltd , 1971,; S R Maheshwari *State Governments in India*, Delhi Macmillan, 1979, C P Bhambhri, *Public Administration in India*, Delhi, Vikas, 1974

[9]*Annual Report* 1969-70, Ministry of Home Affairs, Government of India, New Delhi, 1970, p (i)

The annual report also maintained that:

'Several steps have been taken by the Ministry during the year towards the modernisation of police forces to enable them to cope with the problem of crime and public order in a changing society.[10]

The Ministry collects intelligence regarding 'subversive' activities, and maintains an efficient police force under its jurisdiction for law and order in the country.

Any deterioration in the law and order in the country evokes criticism of the Ministry, and it responds by spending huge resources on the police forces. The Ministry takes shelter behind secrecy, and immunises itself from public scrutiny, except of a peripheral nature, for performing its functions. Its annual reports to Parliament, its statements on the floor of the two houses of parliament, and its observations before a consultative committee of parliament are perfunctory and reveal very little about its actual functioning.

The Government of India's treatment of the naxalites has revealed that a lot of secrecy was maintained to perpetuate illegal repression on the citizens of India. In the name of public order and tranquillity, the Government escaped accountability because repression was conducted in secrecy.

The Ministry of External Affairs supplements the efforts of the Ministry of Defence for national security. The actual functioning of this Ministry has global dimensions, and it is subject to the norms of international protocol and behaviour. The External Affairs Ministry maintains its offices and

TABLE 2 EXPENDITURE ON MINISTRY OF EXTERNAL AFFAIRS

(*Rs lakhs*)

	RE 1977 78
Headquarters	569.34
Missions/posts abroad	2661.97
Supply wings	158.17
Other items	
Contribution to the U.N. Commonwealth Secretariat and other International Institutions	241.22
Central passport and emigration organisation	168.12
Other miscellaneous items	2231.36
Subsidies and Aid	
Subsidy to Bhutan	2466.00
Aid to Nepal	924.39
Aid to other developing countries in Asia & Africa	575.00
Aid to Bangladesh	263.10
Social security and welfare	54.49
Total	10313 16

SOURCE: *Annual Report*, 1977-78, Ministry of External Affairs, New Delhi, p 93.

[10] *Annual Report 1969-70*, Ministry of Home Affairs, Government of India, New Delhi, 1970, p iii

representatives abroad and at home to deal with emerging situations in the fast changing world Its expenditure reveals its important role in public administration in India (see Table)

The Ministry maintains secrecy because our national interests may demand it or other countries may be sensitive to certain aspects of inter-governmental relationships. National interests have to be promoted by the Ministry, and it becomes a safety value for secrecy The spokesmen of the Ministry evade scrutiny because the national interests demand it. How could the Ministry disclose the implanting of nuclear device in India by the United States for surveillance activities on China?

OPEN ADMINISTRATION SAFEGUARDS NATIONAL INTERESTS

Finally, an evaluation of administrative secrecy in the Government of India depends on its actual utility and not on professed reasons of the personnel managing different ministries of the government The yardstick for evaluation of administrative secrecy employed by administrators has to be different from that of the citizen. Secrecy may defend an administrator from an unwanted public scrutiny, and it may promote his efficiency. For a citizen, administrative secrecy may breed corruption and arbitrariness Hence in evaluation of the role of administrative secrecy, we are confronted with two distinct perspectives—of the administrator and the citizen Can these two perspectives be reconciled? Why does a citizen refuse to believe as genuine that national interest demands secrecy? Why does a citizen want to penetrate into the technical aspects of a defence deal or a treaty with a friendly country? Is it mere suspicion between the decision-makers and citizens or is it more than a mere difference of perspectives? Administrative secrecy breeds rumours and ill-founded statements

Not only this A citizen feels cheated if unexpected actions of administrators are revealed after a lapse of many years It has happened many a time that a lapse of time brought facts to public notice which were contrary to earlier stated public facts. With the growing complexity of modern states, the danger of administrative abuses is also increasing Redford has highlighted the weakening of democratic controls over administration in the modern complex phase of human evolution Galbraith refers to the emergence of the 'techno-structure'[11] in the modern state. This techno-structure reflects a wide distribution of influences on decision-making among many strategic centres in the organisation, and its consequence is that administrative secrecy is strengthened because of the technological complexity of decisions. What Redford and Galbraith are discussing is a prevalent feature of the highly complex societies of the west India also is moving towards complex administration, and the experiences of the western societies have validity for us

[11]John Kenneth Galbraith, *The New Industrial States*, Boston, Houghton Mifflin Company, 1967, p. 71

If administrative secrecy is becoming a formidable monster, a few prescriptions may be offered.

(*a*) Administrative secrecy is an aspect of a total political system, and it should be tackled in a comprehensive manner. All efforts should be concentrated on making the Indian political system 'competitive' and 'open'. It is only in an 'open' political system that the ills of administrative secrecy can be tackled.

(*b*) The Special Courts Act of 1979 is an innovation to bring to public light misuses of public authority with speed and efficiency. This institutional innovation, if used properly, would help the exposure of administrative wrongs which remain concealed due to administrative secrecy Any exposure of administrative ills in India with the help of lokayuktas, special courts, and commissions of inquiry would act as a deterrence against misuse of power in secrecy.

(*c*) The press is a very important source of information and investigation into the happenings in the secretariat. All efforts should be made to strengthen the freedom of the press in the country so that it can penetrate into the mysteries of administration.

CONCLUSION

In India, the colonial legacy and people's expectations from government have made political system a critical factor in the survival of the country. The result is, a halo has been created around ministries and functionaries dealing with security and survival of the country. Its consequence is that vital decisions in public administration have assumed great secrecy. All criticisms are silenced by the ministers with a statement that the national interest does not permit a detailed discussion on public policy regarding defence, or law and order, or foreign affairs This trend of ministries taking shelter behind national interest can prove dangerous for our democracy. Hence we should make the Indian political system 'open' to correct the evils of administrative secrecy which is integrally linked with complexities of the modern state The modern state glorifies professionalism and technocracy in administrative decision-making, and the result is that significant public decisions are removed from public scrutiny This is a dangerous trend, and it should be checked, and multiple institutions for scrutiny of public decisions should be created and strengthened It is easy to create research and analysis wings or bureaus of investigation or intelligence agencies, but the problem is to contain them, and this is possible only if the political system is strengthened.

□

Secrecy Needs in Police Administration

P.D. Sharma

ONE OF the characteristics of a democratic government is its openness. The people evaluate the performance of such democratic governments on the basis of availability of information, which they gather from a free press, the opposition protests and public exposures made in the legislatures. However, this imperative of popular vigilance and parliamentary control over public policy through democratic debates has to be extended to some of those areas which are regarded as the conventional preserves of secrecy in administration. People seldom understand the subtleties implicit in the processes of goal-setting and goal-getting in the administration of public policy In their enthusiasm for the former, they carry their conscious concern to the latter area of bureaucratic procedures, which the public servants wish to keep concealed from public gaze.[1] The administiation in a democratic polity has, therefore, to learn to live and reconcile itself with the contradictory pulls of popular pressures, unleashed in the name of 'public interest' and 'public accountability'. Actually, a very delicate balance between the 'needs of secrecy in public interest' and 'demands of openness of public accountability' to checkmate its abuse can be called the credo of democratic administration. Relatively speaking such an administration has to be much more open than its counterparts under other systems of government for the simple reason that its secrecy needs can be accepted only upto a point and that too in a given framework of institutional arrangements.

The totalitarian systems operate in the mystique of secrecy. Politics being exclusive and insulated in these systems, they follow the guarded path and consequently, the administration becomes a professional hideout of secrecy or confidential activities These systems make no secret of the absence of popular participation and their committed model of bureaucracy can keep public administration loyal, efficient and secrecy oriented. Defections, desertations and sensational disclosures are severely punished and the strictest

[1]For details see M Albrow, *Bureaucracy*, 1970, and F.C. Mosher, *Democracy in Public Services*, 1968

norms of secrecy are demanded and adhered to in public interest.[2] Even in democracies the security needs of the state and government presuppose a closed administration of defence services and the police. The administrative operations and organisations of security services cannot be democratised in the larger interests of the state, and if a society is essentially agrarian, its needs for secrecy in military and civil administrations are all the more greater.[3] The nature of the paramount goal, the consideration of the good of the citizens and an effective execution of the administrative decisions are often floated as the bases for secrecy in security administrations. It is a moot point whether the same considerations can be accepted as valid or partially tenable in the civil or non-security administration of the state.

SECRECY, A MANAGEMENT NEED

The term secrecy in its lexicon meaning, stands for things or facts unrevealed, hidden, secluded, kept undivulged or admitted to confidence.[4] In common administrative parlance, it is a synonym for 'confidential'. Obviously, it does not imply suppression or distortion of facts for the mere heck of it. In administrative procedures, secrecy is to be resorted to for the attainment of a higher purpose. It is always a means to an end. When an organisation has to institutionalise secrecy through exclusive structures of confidential cells or intelligence wings to preserve absolute secrecy of procedure in announcing or arriving at certain decisions, it has a higher organisational purpose to achieve.[5] Secrecy of procedure or concealment of facts from a certain section of clientele or the people in general, temporarily or permanently, can be conceptualised as a 'management need' in all organisations, and especially in those which are large, complex and functionally prone to public dealings. Carl J. Friedrich believes that addiction to secrecy is one of the most characteristic benchmarks of modern bureaucracy. He argues that a certain amount of administrative secrecy is inbuilt in the administrative circumstances and hence falls within limits of legitimacy of means for the safeguarding of public interests.[6] Administrative interest in carrying secrecy beyond the limits of this general acceptability lies in a widely shared bureaucratic consensus, emanating

[2]See D.A Barnet, "Mechanism for Party Control in the Government Bureaucracy in China", pp. 423-25; Vogel Ezra, "Politicised Bureaucracy : Communist China' ; Beck, "Party Control and Bureaucratisation in Czechoslovakia " and Armstrong, "The Soviet Bureaucratic Elite" in F.W Riggs, *Frontiers of Development Administration*, 1970.

[3]L.M. Singhvi, *Parliament and Administration*, Institute of Constitutional and Parliamentary Studies, Delhi, 1965.

[4]*Twentieth Century Dictionary, Chambers, New Mid-Century* version, London, 1952, p. 999.

[5]See E Strauss, *The Ruling Servants*, London, George Allen and Unwin, 1960, pp 37-49.

[6]Carl J. Friedrich (ed.), Nomos V, *The Public Interest*, New York, Atherton Press. 1962.

from the following bases of secrecy:

Depersonalisation of Power

Administrative decisions are institutional and not personal.[7] This fact of depersonalisation gives a quality of tentativity to administrative action. No administrator, howsoever efficient or competent, can offer assurances which may not be overridden later under the exigencies of a changed situation This is a fact that renders practical administrators inhibitive, if not secretive Most of them avoid saying too much prematurely, because they are genuinely not sure whether the end product of the administrative process will follow the predictable course In personal matters the individual can effectively control the variables of his decision-making universe He can counteract some of those facts, the publicity of which evokes an adverse response Similarly, in private matters, the commitment to personal values being high, the decision-maker usually likes to pay quite cheerfully for his open positions This is often not the case in public affairs. The depersonalisation of power in public bureaucracies provides a source of interest in secrecy and public bureaucrats in large organisations tend to avoid open positions on issues, which, ultimately, get clinched in the light of inevitables and imponderables.

Administrative Feasibility

Administrative feasibility as a universal administrative concern can be identified as another source of interest in secrecy in administration. "Though a premise of all administrative decisions in administration, feasibility is often not an acceptable reason for action to publics, intensely interested in policy Consequently, there is a strong tendency to conceal this basis of action The organisation must present an idealised version of itself even though the bases of its action cannot always be idealistic ',[8] In simple words, administration is a rational quest and a continuous endeavour for feasibility of public policy, which, by its very nature, has to be somewhat doctrainnaire The people who opt or vote for such idealistic public policies do not want to listen to administrative handicaps that threaten to sabotage them. Naturally, when administrative feasibility is a decisive constraint in the realm of public policy, its open publicity may embarrass the policy makers To avoid this embarrassment or popular reaction against administrative handicaps, administrators tend to conceal the reason or basis of action, which in their judgement is a valid fact, but people are liable to call it a non-issue To put it differently, administrative secrecy is a condition conducive for the formulation and

[7]See M Crozier, *The Bureaucratic Phenomenon*, Chicago, University of Chicago Press, 1964, and also R P. Taub, *Bureaucracy Under Stress*, 1969, pp 192-203.

[8]Victor A Thompson, "Bureaucracy in a Democratic Society", in *Public Administration and Democracy*, Roscoe C Martin. (ed) 1965, New York, Syracuse University Press, pp 222

execution of public policy, which otherwise may be too utopian to be hazarded in practice.

Camouflaging of Power Conflicts in Hierarchy

All organisations have their internal political struggles for power and hidden conflicts of positions in the hierarchy. People in democratic societies expect their public bureaucracies to be a tool of popular interests. They do not accept independent administrative interests of their public servants as legitimate and tend to ignore the fact that even the most rational variables of administrative process have their irrational political overtones about them People in general regard personal appropriation of power and position as contrary to rational administrative norms of action. This being immoral, the taint of personal (or sub-group) interest, usually to be found somewhere in all administrative action, need to be carefully concealed. It is a truism to contend that people are unfamiliar with the realities of administrative universe and camouflaging of political struggles and internal rivalries alone can lend credibility to the system.[9] The bureaucrats never wish to wash their dirty linen in public, because once their personal interests and individual quarrels are exposed to public eye, they cease to be public servants in popular estimation. Naturally, their image and role as servants of the people in a democracy needs to be protected with the shield of administrative secrecy, which, besides being handy, can preserve this Weberian model of the ideal type,[10] which people generally cherish and defend.

The Cementing Force

Thompson argues that, "the actual independence from hierarchical controls, and the control power of lateral interests do not square with the dominant owner-tool doctrine and therefore have to be camouflaged. An elaborate dramaturgy is used to hide these necessary departures from the dominant stereotype."[11] Like internal power struggles of the hierarchy the

[9]Victor A Thompson, "Bureaucracy in a Democratic Society", *op cit*, p. 223.

[10]Carl Friedrich in his *Some Observations on Weber's Analysis of Bureaucracy* maintains that "only an army, a business concern without any sort of employee or labour participation in management, a totalitarian party and its bureaucratic administration, would come nearest to the Weberian model of Bureaucracy" (in *Political and Administrative Development*, Braibanti and Durhaum (ed), Duke, 1969, p 107-35)

Merton further adds that "While theoretically the government personnel are held to be servants of the people, in fact they are usually super ordinate" *Reader in Bureaucracy* by Merton, Glencoe, Illinois, Free Press, 1952, pp 221-32 One of the recent bureaucracy studies attempted by Pai Panandikar and Khir Sagar maintains that "the structural and behavioural characteristics of bureaucracy are only moderately related" Panandikar and Khirsagar, "Bureaucracy in India : An Empirical Study" *Indian Journal of Public Administration*, Vol XVII, No. 2, New Delhi, IIPA, 1971, pp 187-208

[11]Victor A. Thompson, *Bureaucracy in a Democratic Society*, *op cit*, p 223.

deviations caused by lateral interests and other autonomous centres have to be concealed from public discussions. If people tend to feel that hierarchical controls are a mere facade and the dominant stereotypes do not exist, the myth of administrative rationality will be shattered. Here secrecy provides the necessary cementing force and people are made to believe that what they actually do not know, does not exist as well. The gap between administrative norms and administrative behaviours is, in fact, actuated by idealistic prescriptions, and the realistic constraints in administration and administrative secrecy represent a mechanism by which these constraints can be concealed without damaging the professions of rational idealism that cements the organisation.

Thus, the concept of secrecy in administration can be envisaged as 'rationalisation of the irrational' which the irrational wants to see as the rational Whether it is depersonalisation of power, or concern for feasibility, or the need of camouflaging internal conflicts and norm deviations, bureaucracy does not like itself to be presented in an un-Weberian cloak of illegitimacy. The mystique of secrecy is chosen as a necessary evil or a lesser evil for practical reasons, or for reasons of human compassion, or to discharge the obligations of primary relationships not yet fully articulated with the administrative obligations of a complex democratic society.[12] In less developed countries, this conflict of norms creates an anomic situation, in which individual officers can appropriate considerable personal power through fluctuating norms of bureaucratic expediency. Much of this power of public officials in such "clerical, desk class bureaucracies of agrarian societies is derived from their monopoly of knowledge about complex government procedures and requirements."[13] The 'professional expertise' of bureaucrats, to which Max Weber referred, was expertise in such procedures and requirements Preparation for bureaucratic careers in the training academies of these countries is still a study of these procedures, neatly outlined in law books. The desk class officialdom is interested in both complexity and secrecy, which can be termed as the main source of the citizen's dependence upon administration and hence the main source of officialdom's power.[14]

An industrial society breeds a professionalised bureaucracy Unlike its counterparts in developing countries the industrial citizenry is intensely interested in administrative actions and the bases for them It constantly fights bureaucratic secrecy and attempts to hold it within tolerable limits by means of interest organisations, legislative committees, and a free press. The people there generally do not accept departures from rational norms of official conduct and consequently the bureaucrat has to hide and distort his irrational behaviour beyond recognition through elaborate rationalisations

[12]Kahn and Boulding, *Power and Conflict in Organization*, New York, Basic Books, 1964

[13] Thompson, *op cit*, p 223

[14]*Ibid*

and semantic confusions.[15] In the less developed societies, there is no less secrecy than in the professionalised bureaucracy of the developed world, but its bases are certainly less pernicious. A conceptual attempt to discover the bases of professional secrecy beyond the sources of secrecy can yield two justifications of secrecy in administration:

(*a*) An overriding consideration and concern of public good or good of the client, howsoever mistaken the notion may be.
(*b*) A tactical unwillingness on the part of the bureaucratic system to make efforts to translate the technical bases of its public actions into layman's language.

In democratic socities, both these considerations are supplementary as well as contradictory. People must know what is public good, but public actions leading to public good cannot be spelled out in a palatable language of the layman.[16] An average administrator, marking his papers 'confidential' or 'top secret' may be habit bound or blissfully ignorant of the rationality of his action, but he does believe that secrecy about certain facts is helpful in achieving the stated objective. High level theorising apart, secrecy in administration of public policy in a democracy is required because:

1. it protects the politico-administrative process of policy administration from pernicious pressures, avoidable distortions and threatened sabotage at vital points;
2. it provides an administrative ethos conducive for a calm, objective and systemic culling of facts and their purposive evaluation for purposes of policy formulation, policy evaluation and policy revisions;
3. it is an effective tool for efficient, timely and purposeful implementation of public policy, which has to be planned, phased and coordinated at every step.

Thus, even in civilian administration, it is indisputable that administrative decisions and operations are to be kept secret till the opportune moment arrives But then, the critical question is what is to be concealed from whom? How much secrecy, at what point of time, and in what manner, is desirable and compatible with the demands of democracy? The level of popular awareness of the society, the critical nature of the job and the extent of articulation available in the administration of a given polity, can perhaps partly answer these questions and evolve workable solutions.

[15] R K Merton, "Bureaucratic Structure and Personality" in R K. Merton (ed), *Reader in Bureaucracy*, Glencoe, Illinois, The Free Press, 1952, pp 361-377.

[16] Paul H. Appleby, *Policy and Administration*, University of Alabama Press, Alabama, 1949.

THE POLICE AND SECRECY

Police administration is an integral part of the national security administration. For professional purposes internal security of a nation can be distinguished from its external security, but functionally the tasks of the policy and that of the military overlap and remain mutually inclusive. The army has a support structure in police and the police continues to be a coercive structure of power to provide free time to the army to concentrate on matters vital to national survival Conventionally, there are three major functions or the police organisation in a civilised society They are·

1. Implementation of the law or laws of the land
2. Maintenance of public order or peace in society.
3 Preservation of internal security, involving individuals, governments, systems and nations

Obviously, the concepts of order and security, which represent the higher levels of manifestation of law, expect the police organisation to implement all laws ungrudgingly, rigorously and objectively The area of internal security being fairly wide and critical, takes in its fold the total system, which the police organisation seeks to protect, preserve and defend First, there are individuals whose personal safety is called the VIP security of the police system Then, there is the government of the day, which has to be protected against seditious activities and violent overthrow by subversive groups, national as well as international in their network In addition to the government, there is always a political system, sustained by the laws of the land and which, in turn, shapes the other sub-systems of economy, culture and social intercourse The police has a duty to protect all these individuals, groups, sub-systems and governments through the instrumentality of legitimate coercion Of course, the territorial integrity of a nation in the present international system of nation states is ultimately protected by its defence forces, but the police organisation also has to organise systematic intelligence and comprehensive vigilance to make its contribution to national survival

Every state and society has a wide variety of violators of law and saboteurs of public peace in its national confines They may be individual criminals, professional politicians, violent minority groups or perverse gangs of brigands, who may operate openly or clandestinely in defiance of law and may jeopardise the security of individuals, government, institutions and the state The professional tasks, confronted in organising security measures against all such groups or individuals need specialised skills and policemen have to remember the following principles of security administration[17] when they

[17]Background papers of National Internal Security Seminar organised by Internal Security Academy, C R P.F., Mt Abu, from 4th to 8th December 1978 and from 19th to 24th March 1979 (Unpublished)

are face to face with the violators of law and saboteurs of peace.

1. Strategy is a better part of police valour and physical coercion is not a mere muscle activity of the warrior. Naturally, most of the police action during emergent situations of disorder cannot be open to popular scrutiny.[18]
2. The political aspects of criminal intelligence, VIP safety and national security involve serious risks and physical hazards. Secrecy is a worthwhile insurance against these imminent risks, where a minor lapse by disclosure may cause a major debacle.[19]
3. Police action, unlike the army, has to be taken in the midst of political operations and in the thickest heat of social interaction. Naturally, there are countervailing pressures against which the implementation of law needs to be protected. Secrecy of administrative procedures provides the requisite shield under which law may take its own course, without much fear and undue favour.

The police administration represents the executive arm of the state. It wields crude power and has to deal with situations which involve cruder power Its operations have to be time-bound and have to exhaust the procedures established by law. Unlike administration of development projects its writ cannot wait nor can it afford postponement of decisions, when the chips are down It has a job and it must be performed whatever be the cost. The professional nature of the police job devolves very special kinds of administrative and functional roles on the police organisation and it has to work out its own tools, strategies, confrontations and preventions.[20] There are unique situations in police work which can neither be simulated nor anticipated. Similarly, there are opportunities, which once lost, may spell havoc and cannot be retrieved by spending more money or even by investing better competence. Unlike other civil organisations, the police organisation has a strictly rigid hierarchy and perhaps cruder varieties of power struggles and pressure politics, which need to be camouflaged in the garb of departmental secrecy. The entire organisation has to put up one united front in the face of crime, violent disorder or national sabotage. This overriding purpose permits the police organisation to keep its cards packed in its opaque house and it looks defendable if police planning and police manoeuvres are

[18]Background Papers of 6th Internal Security Seminar *op cit*, especially on Nav Nirman Agitation in Gujarat, pp 13-25 J.P.'s Movement, pp. 27-32, *Insurgency*, North East India, pp 127-54

[19]Background Papers of 6th I S Seminar, *op cit*, especially Sections on Arms and Explosives, pp 157-85 and Terrorism, pp 229-56.

[20]S S Vaidyanathan, "Scope for Personal Discretion in Law Enforcement", in *Police at Cross Roads*, S V.P. National Police Academy, Hyderabad, 1977 (mimeo.), pp 80-91.

inaccessibly concealed from all those on whom it has to crackdown once a while with a blitzkirg

The weightier argument for secrecy of police operations is the argument of administrative feasibility and imponderability of fluid variables in the field situations. A police officer has to keep his fingers crossed, till the final outcome of the scene is announced to the people. Like theatres of war, the scenes of police operations have to be planned, masterminded, processed and directed on the basis of prior information collected by the intelligence branch, the crime branch and the CID units of the organisation. The secrecy needs caused by the de-personalisation of power in police work are greater and are more pronounced than in the other departments of the government.[21]

Moreover, a dutiful policeman has to handle explosive situations of violence. Day to day combats, confrontations, and laying of traps are the basic tactics in policing a society. The policeman in all these situations may be endowed with legitimate power, but he can always be overwhelmed by the superior power of the irate mob and the perverse whims of the criminal at large. With limited resources, scarce manpower and absence of popular cooperation, the police organisation has to administer raids, launch crusades and smash dens of vice, all of which require lot of confidential information, secret planning and surprise action.[22] Without absolute secrecy of information circuits and confidentiality of administrative operations, the plans may go awry and cost heavily in men and money. Police officials know at their own peril that premature leakage of information or other clues not only foil their plans but can encourage the outlaws to continue in their lives of crime and vice. Further, it demoralises the cops and its chain effect may cause an incalculable damage to the police organisation and its clients. Moreover, the police are not supposed to have a *dharmayuddh* with the criminals The latter may outwit the former and bring their actions to a sorry pass, if the policemen are not efficient enough to know about their profiles, *modus operandi* and objectives Similarly, by being secretive the police can organise effective preventive networks and contain the adverse effect of law-breaking to the minimum.[23] This professional need of secrecy for job accomplishment in police organisation is so great and so obvious that it has been institutionalised in the creation of CID, IB, CB, ACD and several other allied agencies at all levels.

Secrecy needs in police work follow different patterns under different forms of governments. They vary functionally and also as per the nature and scope

[21]T Anantachari, "Democracy and Social Defence", in *Police at Cross Roads, op cit*, pp 64-69

[22]*See* Proceedings of 4th Internal Security Seminar at I S A , Mt Abu (20th Aug to 2nd September 1978) especially Sections pertaining to sporadic disturbances, pp. 11-15, arms and explosive from the angle of internal security, pp 27-31, espionage and counter espionage, pp 15-21 and insurgency and counter insurgency, pp 31-43.

[23]*Ibid*

of the police agency Actually, the job of law enforcement expects different kinds of laws to be enforced in different degrees of severity and priority. The order of these priorities of secrecy in police work can be seen in an ascending scale in the following areas of law enforcement

Social Legislation: Although there is a visible trend to demand greater police attention in the implementation of social laws like the Civil Rights Act, Anti-dowry Act, the prohibition laws, the Immoral Traffic Act, etc. yet the consensus is that they are non-police tasks and the police has been giving them the lowest priority. Consequently, there is little intelligence available and preventive actions are not effective in the absence of institutionalised secrecy in the department. Recognition of need for social and economic intelligence in police work is a very recent phenomenon and unless it is done police performance and police achievements in the area of social legislation will be far from satisfactory.[24]

Conventional Crime : Police work in this area is a quasi-judicial work.[25] With the prevailing winds of social change and new developments in crime techniques the criminal is in an advantageous position unless secretively encountered by the police Not only this the crime gangs are becoming increasingly articulate and their area of operations has expanded beyond the seas. Then the demands of the system of rule of law envisage that everybody is to be regarded as innocent unless proved guilty. The net result is that prosecution in courts cannot be sustained unless there is indisputable evidence collected from varied. secret and inaccessible sources. The secrecy organisations of the police are going to play an increasingly more articulate and decisive role in police investigations, legal prosecutions, court trials and bringing the guilty to book. Even in organising preventive measures, secrecy is a help and can be used as an effective deterrent in the commission of traditional crime and conventional vice, rural and urban

Public Order : The needs of secrecy in this field are more paramount than in the areas of social legislation and conventional crime. It is a very volatile area, and police actions based on mere hunch, can sensitise it beyond proportions Besides, involving crowd psychology, mob violence and emergency hazards it directly borders on the citizen's most sacrosanct right to

[24]*Second Interim Report of the Rajasthan Police Study Team*, Government of Rajasthan, Jaipur, 1979, p. 6 (unpublished)

[25]Elaborating this point further, Mr. G C. Singhvi writes, "Investigation of cases is part of the judicial process and the police must be entirely independent in the discharge of functions, which are judicial or quasi-judicial . It is of fundamental importance that Justice should not only be done. but should manifestly and undoubtedly be seen to be done. It is in keeping with this doctrine that the judiciary has been separated from the executive It is time, therefore, that the judicial function, comprising investigation and prosecution, is also separated from the police and the home departments, which are under the executive, and are placed under some authority, which may be independent of the executive " G.C. Singhvi, "To Whom Should the Police be Responsible", *Indian Journal of Public Administration*, Vol XXIV, No 1, January-March 1978. p. 119.

freedom, including the freedom to assemble without arms and to protest peacefully against the unwanted policies of the government of the day. Here, the police job is to strike a delicate balance between social peace and democratic freedom, tending to subordinate the latter to the former, in cases of genuine emergency.[26] Secrecy in police management is a condition precedent for purposive police action. Original, timely and valid police intelligence received from secret agencies can save misuse of police by political masters and abuse of police power by the police itself Thus, paradoxically, secrecy in police work enhances the freedom of the individual and protects police misuse or abuse against unscrupulousness

National Security : Like the work of defence forces the police work in the strengthening of national security has to give top priority to secrecy for goal accomplishment Secret intelligence, routine vigilance, defence preparedness and quiet action are some of the basic police functions accepted as legitimate for national security The police has to be extra-ordinarily efficient and effective in doing this job and can, in no case, be allowed to take a chance or hazard a guess Technically, efficiency in this area is another name for perfect secrecy and it is absolutely compatible with the demands of democracy The secrecy needs of internal security administration, howsoever democratic, are a necessary evil for the working of democracy, developing or developed

Thus, from social legislation to national security, the need for secrecy in police work keeps ascending. The hierarchy of police goals determine the quality and extent of secret services in police work It is also no exaggeration to contend that the standards of police performance generally obtain in proportion to the high quality of service rendered by the secret services of the police organisation. Not only this, even the non-secret services of the police stations and line agencies should follow a secret path to enhance the administrative feasibility of their actions, directed towards stated goals. The control of vice, crime and disorder in a society is like an open chessboard where the players have to conceal their respective strategies from each other and also from the viewers, but the viewers have every right to applaud or condemn, if the game is won by skill or lost by default.

Secrecy *per se* is neither good nor bad in any administration All administrations need it, but the administration of law enforcement needs it much more than others, because of its critical nature and professional requirements So long as it hightens the goals of the police organisation, it has to be accepted as 'legitimate' and must not be violated through so-called democratic disclosures But then, any abuse by the police in contravention to the democratic freedoms of the citizens is likely to result in the perversion of its secrecy preserves also Here secrecy does not mean opaqueness and a democratic system should battle the abuse of secrecy through public exposure of its institutional devises. National security apart, secrecy in police work has to be

[26]*Final Report of the Rajasthan Police Study Team, op cit*, pp 80-83

reconciled with the basic civil liberties of the citizens. Several kinds of legislative, quasi-judicial and non-official institutions should be created and encouraged to evolve a system of limited exposures and counter checks to avoid the likely misuse of legitimate secrecy, permissible in professional police work. It is essentially a matter of institution building, wherein the conventional growth plays a significant part. Firmness in law enforcement is a part of the democratic game and democratic openness should not necessarily weaken it. The limits of legitimate secrecy can be publicly delimited by making them conventionally congruent with the democratic openness of the system. It is a truism to contend that secrecy in police work has potentialities of being abused, but let this also be understood that an absolutely open police system is the end of all policing.

□

Use of Secret Intelligence

In order for the knowledge obtained by espionage to be used, it must pass through a very elaborate process of analysis and through many offices. The probability of being mislaid or passed over in the heavy flow of material is certainly not negligible. Then when it reaches the person who can utilize it he is faced with the question as to whether it can be trusted. Spies are not esteemed by their superiors and they are often the victims of 'plants' of false information. On many occasions the uncertainty as to whether the data reported by a spy are true, false or planted, results in inaction. Finally, intelligence staffs, even if they arrive at firm conclusions, must contend with the operational side, and just as spies are not esteemed by their masters, the intelligence is not always esteemed by politicians and the military men who are outside the intelligence services. The chances of utilization of the information diminishes at every stage.

—EDWARD A. SHILS.
The Torment of Secrecy, 1956.

Over-Secrecy in Reporting Communal Incidents

S.C. Misra*

THE NEED for observance of secrecy in certain spheres of public administration is indisputable and is rather an essential requisite. Its necessity has been recognised from the earliest times Arthashastra lays great stress on the inevitability of the king keeping himself fully informed, not only about the state of law and order, the needs and morale of his subjects, but also of the activities of disloyal and recalcitrant elements amongst them who might endanger the security of the kingdom [1] Thus Chanakya elaborated a scheme of complicated spy-system which covered almost all sections of the society and permeated every sphere of the administrative activity. Obviously, state secrets pertaining to the essential administrative wings like the military, industry, trade and political affairs were all required to be closely guarded, for compulsions of self-preservation and to obviate any advantage that the enemy might derive through neglect, in a pre-emptive move

SECRECY THE RATIONALE

These very principles have given birth to modern concepts of secret police and other intelligence agencies in security organisations Espionage which is aimed at collecting secret information about the affairs of other countries, and counter-espionage which amounts to counteracting the espionage system of other countries, are now internationally recognised and accepted as essential features of a country's administrative system Any country failing to fall in line with this concept runs a great risk of jeoparding the interest of its citizens. In fact, any lapse in this regard, exposes the administration to the charge of neglect of grave and serious proportions

International diplomacy is no longer an open affair. Most embassies have in their staff undercover secret agents, both for espionage and counter-espionage purposes Espionage, in modern times, has been raised to the level of a fine art and has been given a certain amount of respectability Spy stories sell like hot cakes and there are numerous instances on record of spy

* The author is thankful to Dr P D Sharma, Reader in the Department of Political Science, Rajasthan University, Jaipur, for his valuable guidance and help

[1]Kautilya, *Arthashastra*

activities bringing down many administrations, during wars as well as in peace time, through coup and counter-coups. In this connection, the two most powerful secret service organisations working for the USA and USSR, viz, CIA and KGB, are now common knowledge and their exploits and significance need no elaboration. In such an atmosphere of international intrigue, there can be no letting up in emphasis on secrecy. All political systems, including that of India, for this reason, require a constitutional oath of secrecy to be taken by the President, the council of ministers, judges of the High Courts and the Supreme Court, and all other important functionaries The bureaucrats and other categories of government servants, who are likely to be called upon to handle classified material are bound by the Official Secrets Act, the violation of which makes them liable for drastic punishments.

IMPROPER APPLICATION

However, this concept of secrecy in administration when overstressed, can be counter productive, specially in a free and democratic society like ours. People are entitled to access of certain kinds of information in which they are interested. Otherwise also, in an elective system of representative democracy, there should be a continuous dialogue and exchange of information between the people and the government on matters of vital public interest. There can be no controversy that utmost secrecy is required to be observed and it should be obligatory to do so, in matters of vital national importance, like the strength, armament and location of our armed forces, essential statistics and situation of key industrial installations, specially those affecting the defence of the country, schemes and policies to combat insurgency and other sensitively political and international matters.[2] These are only illustrative and there may be many more in this category, the leakage about which may be detrimental to national interest or promotion of cordial international relations. These must remain closely guarded secrets for obvious reasons and due stress needs to be given on their preservation.

Experience, however, shows that this caution for maintenance of secrecy is often overexercised and that too in an unintelligent manner. Very frequently it extends to completely innocuous fields This increases work for various agencies handling them, for all documents concerning them have to be properly documented, filed and handled by higher category of personnel. The sheer abundance of classified material dilutes the importance of the more important ones among them and facilitates leakages. The correspondence between the Central Intelligence Bureau and the State Intelligence Agencies is a classical example of this thoughtlessness. It has become routine for

[2] See proceedings of 3rd (3rd to 8th July, 78) and 6th (19th to 24th March, 1979), Internal Security Seminars, organised by Internal Security Academy, Mount Abu

every letter, even a routine communication, to be placed in a double cover, sealed, registered and insured, and then marked to the highest officer by name for his personal handling. Obviously it is an enormous waste of his precious time and involves a colossal misuse of government funds which are perpetually scarce in a developing society like India

OVER-SECRECY ABOUT COMMUNAL TENSIONS

The phobia for secrecy is carried thoughtlessly even into the fields of law and order, particularly when communal incidents cause tensions While reporting about communal incidents or large-scale disturbances, there is an obnoxious tendency to hide the truth and camouflage the incidents in a way that no body is able to know the reality The idea perhaps is to cover up administrative deficiencies and keep an escape route open in case of public or official criticism. The facts and inferences drawn from the reports, can then be denied later, if necessary, and convenient interpretations given to the wordings of the reports It is little realised that such manoeuvres at hiding the truth from the public are not at all necessary and are positively harmful for the long term credibility of the administration. They create avoidable misgivings in the public mind and give rise to all kinds of speculations

SPECULATIONS

After all, a democracy is a government through public dialogue on matters of public interest These democratic debates can be meaningful and purposively effective only when people have access to correct facts and have a free atmosphere to verify and evaluate these facts in the light of their empirical experiences Vague, multi-meaning and misleading reports about the facts of communal riots generate ill-informed debates and lead people to draw disastrous conclusions about an unfortunate situation, which need to be averted by intelligent understanding and political courage to face facts

Press reports and the news contained in the All India Radio bulletins are mostly based on the official hand-outs and briefings on such occasions During the period of the disturbance due to curfew restrictions and communal feelings running high, it is too dangerous for the press and the AIR reporters to move about and to collect information. They have per force of circumstances to depend on official information Even otherwise, restrictions are very often placed on them only to publish the official versions During the course of time, administrative officers have developed a universally accepted fine technique of shrouding real facts in a verbiage of coined jargons which are not capable of any clear interpretation The efficiency of a district officer is often judged by the finesse with which he can accomplish this feat and get away with it. No body seems to bother about the public reaction to such reports. The citizen never comes to know the real facts about the origin of

the trouble, the people involved in it, and the damage caused to public and private property. In a democracy this can hardly be termed as a fair dealing with the public who are entitled to know all the details of an incident which is of concern to them. This attitude my have had a relevance during the rule of the aliens, when it was in their interest to gag the public and the press to keep the flag flying.

Over secrecy in reporting about communal riots in those days was an imperative of the situation. Besides, bringing a bad name to the government, which prided in strict maintenance of law and order, correct statistics about communal carriage was regarded as a sad commentary on the efficiency of the police force, especially in the face of the universally accepted charge that communal riots were engineered by the British rulers for political reasons to keep the populace divided

This way of dealing with the public now in a free society can only be termed as mere lack of responsiveness to the people and to some extent deliberate dishonesty with the citizen.[3]

One is told repeatedly, almost day in and day out about a clash occurring between two groups of people. resulting in deaths, arson and looting of property. Citizens are told that a twenty four hour curfew was clamped and varying contingents of CRP and BSF rushed to the trouble spot. The nature of the trouble or the complexions of the warring groups are deliberately suppressed. One invariably guesses that it was a communal trouble, for otherwise there would be no need to conceal the identity of the people involved. This starts a chain of pessimistic thoughts; the average Muslim thinks that Hindus must have been the aggressors while his Hindu neighbour thinks otherwise. From the fact that a twenty four hour curfew had to be clamped and special para-military forces had to be rushed, there is left little doubt in the mind of the average person that loss of lives and property must have been colossal to demand such a drastic action. They cannot be blamed for imagining that the trouble must be widespread, and those having relatives or friends in the town of trouble or neighbouring areas to feel extremely concerned about their welfare. In this confusion, it is natural for all kinds of rumours to spread, which find easy credibility in the absence of any reliable official version. This unbriddled speculation and spread of rumours (which are the creation of the administration itself) due to their over-anxiety for secrecy, have often led to escalation of the trouble and tension even in far-flung areas Hindu-Muslim relations, conditioned by historical factors, are such that even a far-fetched rumour is enough to kindle a passion for revenge in the two communities

[3]*Report of the Verghese Committee.*

UNPURPOSIVE SECRECY

The intention of the administration in maintaining this unnecessary secrecy, is very unclear It hardly serves any public purpose or helps to ease the situation It would be quite understandable, if the administration completely refused the dissemination of the news till the situation was fully controlled. But when it is publicised that a clash had taken place and stringent administrative measures had been taken, the army had been alerted and hundreds of people had been put under arrest, houses searched and arms and ammunition recovered, what does the administration gain by suppressing the fact that the groups clashing belonged to the two rival communities of Hindus and Muslims. After all, the motive behind hiding the genesis of the trouble, the identity of the trouble makers, the communities of the dead and the injured and those who were found in possession of arms and explosive material, has to have some rationality behind it and should serve a public purpose. To continue with the system merely on the plea that it has been a continuing administrative practice, reflects lack of imagination and distrust of the people. Because of this official attitude today very few people have faith in government bulletins on such and many other occasions. It is a general belief that administrators minimise loss of life and property. The people, therefore, generally multiply the official figures by two or three to draw their own inferences To think that people would be shocked by announcement of true facts is to overlook the reality of the social system. By now people have become accustomed and conditioned, so far as communal riots, civil disturbances or natural calamities are concerned. They have been hearing about them for years and the news does not make much dent on them. But they are certainly interested in the trend of communal politics, its causes and cures, and about the welfare of their friends and relatives in particular.

This ingenuity in reporting is by no means a post-independence phenomenon It has come down from the British days. The only difference is that it is no longer relevant in the present set-up As a young Superintendent of Police, I can recall, having been pulled up sternly for my plain and direct reporting of facts about a communal incident.[4] A Dushehra procession, while passing in front of a mosque, was stoned and attacked, resulting in serious communal rioting in a major town of my district As required by the rules, I sent a telegram to my senior officers under the following contents.

> Dushehra procession attacked by Muslims while passing in front of Rohalla Mosque Police fired thirty rounds buck-shot. Situation under control Detailed report follows

[4]The incident relates to the importing of a communal riot in the town of MAU in district Azamgarh, U P, in the year 1939.

To my dismay and utter surprise I was accused of being a partisan. I was condemned of being prejudiced, the implication being that a Hindu officer could not call Muslims as aggressors. Though later I learnt to couch my reports in ambiguity, I am not convinced till today whether any sane person could conclude that Hindus themselves would have thrown stones on their own procession and attacked it with lathis from inside a Muslim mosque. The situation has not changed much in secular India. The police officials in centres of communal trouble cannot afford to be honest even with a government which professes to be secular in its official behaviour. The art of couching reports about communal incidents by officials in charge of law and order has more serious repercussions today than it had in those days when public services prided in administrative efficiency and professional commitment. Our reporting or under-reporting about facts, fictitious or genuine takes a heavy toll of the morale of public services, and the administrators once trained into it, carry it to other realms of administrative activity to pursue their own ends.

SECRECY AND RUMOUR MONGERING

Judicial enquiries into communal riots have time and again emphasised the havoc caused by wild rumours which invariably went uncontradicted from official quarters. This again shows reluctance of authorities to come out with true facts. Perhaps, they have come to realise that a time has now come, when even if they did contradict a false rumour, their version would not be believed. A vicious cycle has really overtaken the administration. In this connection, it would be relevant to make a mention of the observations made by Justice D.P. Madon.[5] While recommending pre-sensorship of news relating to communal disturbances to prevent coloured and exaggerated versions getting into the press and the issue of news bulletins by the authorities themselves, Justice Madon drew pointed attention to the practice of distortion of facts in the official hand-outs to the press. He observed, "The bulletin should however not be such as to defeat its own object by giving rise to speculations and circulation of wild rumours. The news given by the authorities should be factual, objective and not crouched in vague terms."[6]

The argument that news of communal incidents have adverse repercussions for us internationally, has also lost validity with the passage of time. Experience shows that Pakistan and even other countries of the world get news of these incidents sometimes even before we can do so. Moreover, due to obsession with over-secrecy in reporting of communal incidents in the

[5]Report of One Man Commission of Inquiry, set up by the Maharashtra Government on 12th May, 1970, consisting of Justice D.P. Madon, Judge High Court, Bombay, to report on the communal disturbances in Bhiwandi, Jalgaon and Mahad

[6]*Ibid.*

Indian administration, people place more reliance on BBC broadcasts or news relayed by Pakistan.

The discrepency, being obvious and glaring, erodes the credibility of the news media and the government of the day which takes its people to be gullible. Moreover, it is tentamount to dis-service to the country where stark facts are accessible to all the citizens of the country and people of the world through an internationally competitive system of information and mass communication. This is taking secrecy too far and attempts to be over secretive in the name of public interest prove self-defeating and leave the people enraged and vulnerable to provocative rumours. A democratic government must share its anxieties and concerns with the people and should take them into confidence by feeding facts. Reporting about communal incidents by the administration is an area wherein the outdated practice of over-secrecy by the Police and Home departments should be replaced by an enlightened and rational system of honest and correct reporting.

□

Protecting Law and Order

It is central to the continuation of our way of life that law and order should be preserved There is a legitimate and desirable public interest in information relating to the organisation and conduct of the police, the courts and the prisons, but there can be no legitimate interest in information which, for example, would help directly in the commission of a crime. Nevertheless the Government is concerned that, when the definition of this category comes to be drafted for the Bill, it should be so framed that there can be no doubt that the criminal sanction applies only when there are strong reasons, as set out above, for preserving confidentiality.

White Paper on Official Secrets
Act 1911, HMSO, 1978

Review Article I

Administrative Secrecy Vs. Openness in UK*

S.C. Vajpeyi

THE POWER structure today is much different from what it was in the 19th century or earlier. In those days, the government concerned itself with the maintenance of law and order, with defence and foreign affairs. It left industries to the manufacturers, merchants and traders and welfare to charitable organisations. It did no planning. The philosophy of the time was *laissez-faire*. In the present century, the government has concerned itself with every aspect of life and consequently we have the concept of the welfare state. As a result, the governors exercise unfettered discretion for the common good They regulate housing, employment, planning, social security and a number of other activities. The philosophy of the day is socialism or collectivism. But whatever the philosophy or system of government, there is always a danger to ordinary man. It lies in the fact that all power is liable to misuse or abuse and the greater the coverage of the activities of the state, the more the power and, therefore, the consequent increase in the possibility of its misuse or abuse. The great problem, therefore, before the courts, the media and ultimately the public—the masters—has been how to cope with the abuse or misuse of such power. Thirty years ago, Lord Denning in his book 'Freedom Under the Law' had outlined this challenge in these words:

> Our procedure for securing our personal freedom is efficient, but our procedure for preventing the abuse of power is not. Just as pick and shovel is no longer suitable for the winning of the coal, so also the procedure of mandamus and certiorari and actions on the case are not suitable for winning of the freedom in the new age. We have in our time to deal with changes which are of equal constitutional significance to those which took place 300 years ago.

What Lord Denning then said about 'winning of the freedom' also fully applies to the methods available to the people to exercise a check or restraint on the activities of the state and to make it more accountable.

*Based on 'The Crossman Diaries', Vols. I(1975), II(1976) and III(1977), 'The Crossman Affair', Hugo Young (1976), and the UK Government White (1978) and Green (1979) Papers.

Indeed, the government machine has now become so large and its internal systems of communication are so limited that without serious discussion in the press of these matters, there would often be inadequate knowledge, or inadequate distribution of knowledge inside the government machine itself.[1]

Strict enforcement of the cult of secrecy, if carried to the extreme, would seem to require censorship of public discussion of issues or a complete quarantine between journalists, ministers and civil servants resulting in the inability of journalists to bring their background knowledge and experience into play when writing about the issues of the day[2] Information is necessary to determine whether the government is protecting public interest It may as well be doing so without this being known. Access to such information is the life blood of democracy; and if it does not flow, democracy withers.[3]

From the earliest times, governments of all types have been understandably anxious to preserve secrecy in respect of matters affecting the safety or security of the state or about matters touching the relations of one state with another, or affairs relating to maintenance of law and order within the state. As coverage of the activities by the state increased, so did the desire of the government for secrecy and for according its activities protection against unnecessary publicity or exposure. The conflict between the maintenance of secrecy and the diffusion of information in regard to the functioning of the governments has been increasing in recent years, because of the widening scope of the umbrella of such activities affecting all affairs of the citizen, more particularly his economic life, advances of science having both peace time and military implications and collection of more information regarding individuals about their daily life through computers and other methods necessitating safeguarding of the citizen's confidence. Governments have been worried about the disclosure of official information of all types—not necessarily about matters relating to defence or national security—long before the law regulating official secrets came into being. To take an example from UK, early in 1873, after a series of cases involving the use of official information, the Permanent Secretary of State wrote "the unauthorised use of official information is the worst fault a civil servant can commit It is on the same footing as cowardice by a soldier. It is unprofessional "[4]

There is near unanimity that matters affecting the defence or security of

[1]William Rees Mogg (editor of *The Times*) in his evidence in Crossman Case before Lord Chief Justice, Lord Widgery on July 22, 1975 (hereinafter referred to as Crossman Case)

[2]Peter Jenkins (author of *Battle of Downing Street*, 1970, London) in his evidence in Crossman Case

[3]Ralph Nader, *Freedom of Information, Clearing House*, Charles Peters & Michael Neltson (1979), Holt, Routledge & Wintour, p. 251.

[4]Report of Departmental Committee on Section 2 of the Official Secrets Act, headed by Lord Frank, Vol I, p. 120 (CMND 5104) (in 4 volumes)

the state, or affecting the foreign relations or the conduct of foreign relations, or any proposals, negotiations, decisions connected with the value of currency or relating to the reserves should be covered by law and breaches of the law should be punishable. It is also generally agreed that certain information regarding individuals or associations or companies entrusted or made available to the government on confidential basis should be similarly safeguarded. It is in regard to the functions of the government covering other areas and the processes of decision-making that differences arise about the question of maintenance of an attitude of openness or secrecy.

It would be appropriate to notice at this stage the observations of the Fulton Committee[5] in regard to administrative secrecy in UK. It says:

> We think that the administrative process is surrounded by too much secrecy. The public interest will be better served if there were a greater amount of openness.

The report recognised that "there must always be an element of secrecy" not simply on grounds of national security in administration and policy-making, and suggested the setting up of an inquiry to make recommendations for getting rid of unnecessary secrecy in UK. The government of UK published a White Paper in June, 1969 on the subject entitled 'Information and Public Interest' suggesting a review.[6] The Conservative Party manifesto at the 1970 general elections promised to eliminate unnecessary secrecy concerning the workings of the government and review all the operations of the Official Secrets Act, 1911. The Franks Committee was appointed in 1971 as a result of these recommendations. This Committee submitted its report which was published in 1972. The proceedings and recommendations of this Committee produced a national debate. Protection of Official Information Bill was introduced in April 1979[7] to implement, with modifications and additions, the recommendations of the Franks Committee.

NEW POWER CENTRES

It is now recognised that one of the most serious weaknesses in British democracy today is that the enormous expansion in the range of governmental activities has swamped the critical resources of parliament as well as those of the press. While power and decision-making have moved from Westminster to Whitehall and from Whitehall to various regional councils or quasi-government bodies, the political journalists remain largely centred on a parliament that is no longer effective enough to secure the information it

[5]Fulton Report on the Civil Service (VI 1968), pp 91-92, CMND, 3638 HMSO.
[6]White Paper 'Information and Public Interest' (1969).
[7]Protection of Official Information Bill, 1979 25th October 1979 (50438) HMSO.

needs to form a proper judgement of the issues to decide on. For similar reasons, the twin doctrines of anonymity of civil servants on the one side and the ministerial responsibility on the other are being eroded. Ministerial responsibility is still an accepted doctrine in the political world and in schools, but it bears increasingly less relationship in practice to what the general public thinks and believes. Most people think that parliament is unable to protect them against the arbitrary actions of the vast governmental machinery and they are encouraged in their belief by statements of an increasing number of backbench members of parliament.[8] This fiction of ministerial responsibility, however, enables members of parliament to demand information in regard to any activity falling within the purview of the department for which the minister is responsible. Ministerial responsibility is no longer adequate as a device for securing an administration accountable to society, first, because the continuous growth in the bulk of business increases the 'fictitious' element in the responsibility and, second, because the time span of the major decisions on government operations is lengthening—the Concorde airlines project is a good example where almost a decade elapsed between the start of negotiations and decision Responsibility of a minister becomes more dispersed—sometimes too diffused and distributed to stick and wherever it is likely to stick the minister could, by refusing to give information or by giving it in such a clever way as not to give crucial information, while appearing to give it (for which parliamentary answers are so famous), cover up his department's mistakes A remedy is now provided by the Parliamentary Commissioner for Administration, who makes independent investigations under statutory powers and is able to unveil what happens behind the ministerial screen

The convention of anonymity also, as Fulton says,[9] is being eroded. The reason is that the civil servant now comes in contact with so many members of the public Typically, a civil servant comes into contact not with *the* public but with *a* public—a section of the public who have an interest in common. Officials of the education department deal with leaders of teachers' unions and likewise These numerous and continuous contacts constitute further inroads on the conventional anonymity. The administration also qualitatively suffers from the convention that only the minister should explain issues in public, on the assumption that he knows and controls all the operations of the department—an assumption no longer tenable Once the specialised public knows the civil servant by name, it will soon get to know his ideas and views which he will feed into the policy-making process. As a result, attempts are made to pierce the curtain of anonymity of the individual member of the service from whom advice to ministers on crucial matters is said to have originated. A good example of the new wave is Samuel Brittain's

[8]M Beloff, "Defining the Limits of Official Responsibility", *The Times*, Sept. 11, 1967—quoted in Henry Parris—*Constitutional Bureaucracy*, 1969.

[9]*Fulton Report on the Civil Service*, *op. cit.*, p 93

'The Treasury Under the Tories'. He argues that the two extreme views about senior civil servants that either they are pliant mind-readers executing policies in which they have had no say or that they urge single course of action on minister after minister, are equally untrue. The truth lies in between.[10] Anonymity is not a condition of permanence. A civil servant may have to resign if his views on major questions or party affiliation become known. It is accepted that officers of armed forces should sometimes resign if their recommendations are not accepted by the minister. This gives service chiefs a power to persuade the minister, which their counterparts do not possess. Hence a reduction in anonymity might increase the influence of the civil servants as well as import valuable clues and information to make administration more accountable to society.

Neither anonymity nor ministerial responsibility should, however, be made a fetish of. They are meaningless except as ways of making administration more accountable to society. The vast growth of the role of the state and the consequent power of the bureaucratic machinery render it increasingly necessary for the public to have available to them in detail the process by which important decisions are arrived at various levels. More openness not only exposes errors at an earlier stage, but it ensures a system where errors are less likely to occur. There is a whole area of public concern that the local government can legitimately reveal to the public and which the central government does not do. Publication of the reports of inspectors in the Ministry of Housing and Local Government in UK, initially resisted in 1958, serves as a good example. Secrecy is an obstacle to good policy-making when it prevents the gathering of sufficiently wide range of opinion and advice and when it narrows public discussion of policy issues It is further argued that secrecy should not inhibit the release of information or the stimulation of discussion and work in the earlier stages of planning and policy-making. The danger is that secrecy, for whatever reason it starts, becomes a habit. It becomes an excuse for preventing others from looking over your shoulder and a way of avoiding trouble and escaping post mortems.[11] Secrecy may sometimes allow greater efficiency, but not necessarily greater wisdom. Extremes to which it can be carried can be illustrated by the famous cases of Lady Gardneers at Hampton Court being covered by the Official Secrets Act, or the refusal of supply of information regarding the number of trees grown in the Greenwich Park of London to the editor of South East London Mercury or the refusal of the place of storage or refusal of cases to a *Daily Mail* reporter in 1964 when there was a typhoid epidemic in Aberdeen in UK or its use to prevent public ventilation of staffing matters or departmental defects, malpractices or improprieties.

As Jo Grimond, MP said in his affidavit before Lord Widgery in the

[10]Samuel Brittain, *Treasury under the Torries*, pp. 38-39, 1964.
[11]*Fabian Tract No.* 355, 1964, p. 22.

Crossman Case, publication of material relevant to decision-making is useful and important. He said:

> Bureaucratic frame of mind, self-regarding, hierarchical and averse to open discussion is a major though perhaps well intentioned threat to our society. ...That they should operate in secrecy with very little accountability to the public is against the national interest. It is very difficult for a Member of Parliament or any citizen to penetrate the veil of secrecy which surrounds the means by which decisions are made in Government.[12]

It is, however, common ground that a great deal of information is given by government departments to the press and public Every civil servant may be authorised, either by his superior or by the nature of his duties to communicate to the outside world. Ministers are self-authorising and senior civil servants often function under the guise of implicit authorisation. In major matters, the release can well be at the ministerial level and then downwards, but in many of the day to day matters, where one deals with the middle level civil servant, one may not get this openness because he is still in doubt, he has not got his direct briefing and this is where one meets the difficult or capricious situations referred to earlier where one departmental official will not say something and another one will. It is here that the directional concept is valuable. The question is whether it is a situation where nothing is published except what the government ordains to be published or whether the public is entitled to the information that governs its life. It is a question of changing the direction of the flow of information from negative to positive or positive to negative.

In a democracy, the administrative apparatus normally consists of the political executive, represented by the ministers as members of the cabinet, who lay down the policy and supervise and control its implementation, and the executive which may loosely be called the civil service or administrative machinery working thereunder. It has always been assumed by politicians and the civil service that cabinet proceedings and cabinet papers are secret and cannot be publicly disclosed until they have passed into history. The cabinet works on the doctrine of collective responsibility. When the cabinet reaches a decision, irrespective of individual views held or expressed. each member shares in the collective responsibility of that decision. When confidentiality among colleagues in the cabinet is lost, discussion will be less [illegible] and frank. Its quality will be impaired and so will the quality of the [illegible] reached. The unauthorised disclosure of cabinet documents [illegible] public confidence

[12]Jo Grimmond (M.P. [illegible] former leader Liberal Party [illegible] Crossman Case.

THE CROSSMAN DIARIES

It is on such a horizon of public life and administration that Dick Crossman came as one of those meteors that occasionally lighten the British political firmament. His lasting contribution to this debate is not only through his numerous writings as a political scientist, nor his crucial and crusading role as a minister from 1964-70, but in the publication of his diaries[13] after his death. His deliberate aim, as he put it in the introduction to the first volume was "to disclose the secret operations of Government, thereby enabling the humblest elector to cut his way through the masses of foliage which we call the myth of democracy".

The value of the work lies not in any specific facts or stories, though occasionally they do throw useful light and illustrate some valuable aspects, but on the total impact created by the mass of details, the accounts of meetings, of deputations, of intrigues, of behind the curtain discussions. The cumulative impact of the stories and episodes concerning Lady Sharp, his permanent secretary, and regarding her replacement is helpful and constitutes a valuable part of the book. It will probably be one of the best uninhibited accounts of the minister-civil servant relationship.

Crossman was always critical of the expanding power of the British Prime Minister and had used the expression and expanded some of the arguments and material of John P. Mackintosh's book 'The British Cabinet' in his introduction to the Fontana edition of Walter Bagehot's book 'The English Constitution'. Therefore, the picture Crossman depicts of cabinet government shows the complexities of the machine. He describes the functioning of the official committees parallel to the cabinet committees and how they would consider the proposed agenda and take a tentative stand on various issues almost anticipating the decisions formally to be taken in cabinet and its committees. Crossman gave some lectures at Harward which were later published.[14] The record of discussion of some of the points in that connection provides interesting sidelights. Crossman had mentioned that since the PM alone approves the minutes after they had been drafted by the cabinet secretariat and as he was able to have the minutes written as he wanted, the record of cabinet discussion and decisions could be slanted and this greatly strengthened the PM's hands. Elsewhere, he illustrated the omission from the minutes of certain observations, comments or episodes on occasions depending on the exigencies of situation. Then he had said that the "Cabinet Secretary, Burke Trend was Harold's grand vizier and the Cabinet Secretariat his praetorian guard and the way to the top of the civil service is via Cabinet Secretariat".[15] His reference to the power wielded by the cabinet secretary

[13]Crossman, *The Crossman Diaries*, (1979) Hamish Hamilton & Jonathan Cape. (First published Diaries of a Cabinet Minister, Vol I, 1975, Vol. II, 1976, Vol III, 1977)

[14]Crossman, *Inside View*, 1972, London, Cape

[15]Crossman, *The Crossman Diaries, op. cit.*, pp 625-627.

The incident narrated lends an inevitable echo in the minds of those who have dealt with similar matters or situations at one time or the other. But what is not appreciated or publicised sometimes is the reversal of the roles of the civil servant and the politician—one wanting to reveal and the other to suppress Even in the instant case, without questioning Crossman's ultimate soft attitude towards more openness, perhaps one could find a part of the clue from the fact that if part of the report was suppressed, he apprehended severe criticism from "one of the cleverest conservative lawyers" in parliament. It is as a result of similar experiences that Crossman came to agree in part with the power and influence of the civil service, but agrees that a powerful, hardworking, self-confident minister, with the backing of the PM, can see his way through.[18]

Yet another aspect on which Crossman has thrown valuable light is the functioning of the sub-committees of the cabinet and the procedure followed in decisions being taken by the chairmen by establishing consensus and not by counting votes. A minute of PM Wilson on cabinet committee procedure quoted by Crossman makes interesting reading. If you had standing committees with permanent members working as a team, as microcosm of the cabinet, it would be satisfactory; but if half the awkward decisions are shoved outside into these committees, with the concerned minister's right of appeal against its decision being very limited, cabinet government could possibly be finished.[19] Similarly, the book abounds in graphic and detailed descriptions and discussions of relations with colleagues, pressure groups. parliament and functioning of inner groups and the inner cabinet. It has been said to be the most important book on British Government to have appeared since the war.

The importance Crossman attached to the publication of his diaries is evident from the fact that his first action after hearing in September 1973 that he could expect to live only a little longer was the writing of a letter to his publisher saying,

> . The main immediate task of the literary executors if I die before publication of my ministerial diaries is complete, would be...to make sure that the pressure which will undoubtedly be brought both from Whitehall and from Westminster to prevent publication part of the manuscript is completely rejected..."[20]

THE TRIAL

Crossman's words were prophetic indeed. Pressure did come from the expected quarters. But the struggle for publication created history as this

[18]Report of Departmental Committee on Section 2 of the Official Secrets Act, *op. cit.*

[19]Crossman, *The Crossman Diaries, op. cit.*, pp. 619-620.

[20]Hugo Young, *The Crossman Affair*, London, 1976, Hamish Hamilton & Jonathan Cape, p. 12.

was the first occasion when the Attorney General deemed it necessary to take action in a court of law, on the report of the secretary to the cabinet This historic trial began on July 22, 1975 before the Lord Chief Justice, Lord Widgery. Numerous authors, jurists, politicians, social scientists and ex-ministers gave evidence through their affidavits from both sides. Appearance of Sir John Hunt, cabinet secretary, as the only witness to give oral evidence was another unique event. *Sunday Times*, who were to serialise the book, and the literary executors of Crossman, defended the case through their distinguished counsels.

Until World War I, there was no cabinet secretariat, no minutes and no agenda It was only in the 20th century that memoir writing by senior ministers began and a convention was established that they were allowed access to cabinet papers to refresh their memories The danger of this writing was that the authors who enjoyed privileged access has sometimes strong motives in slanting their contributions to cabinet discussions, with a view to enhance their position in contemporary history. The first example arose from the controversies of World War I Winston Churchill quoted from war cabinet papers in the 'World Crisis' to justify his role in Dardanelles operations, and so did Lloyd George for his 'War Memoirs' After the two wars, a more liberal view was taken for some of the books by the cabinet secretary and the PM as they were in the nature of memoirs A fascinating review of memoir writing and control procedures was recounted in an affidavit[21] before the court which did conclude that the control procedures were in the process of evolution and extension from 1916, when the cabinet office was set up, till 1934. In practice, ministers established a form of right in equity, in the nature of an honourable convention, to lay before the public the justification of their policy or stand. The limitation of public interest was recognised by ministers, but they refused to be bound by a fixed doctrine in terms of years, least of all by the fifty or thirty years rule (under the Public Records Act).

The convention and past practice regarding the basis on which the memoirs were examined in the past by the cabinet secretary reflected the needs which were felt for the protection of certain types of information They were codified for the first time by Sir John Hunt, then cabinet secretary, to deal with the issues arising in the Crossman case and called 'parameters'—an expression which has since been used consistently. In essence the objection contained in these parameters to the publication of the diaries was against 'blow by blow' accounts of cabinet or cabinet committees so as to reveal the views and attitudes of different ministers, disclosure of advice given by senior civil servants and also about discussion and considerations leading to senior civil service appointments.

[21]Keith Middleman's (Lecturer in Modern History at Sussex University) evidence in Crossman Case.

The main issue in the case was: have the courts the power to protect the trade secrets of the board-room, the confidence of marriage, the correspondence between the client and professional adviser, but not the confidential discussions on high matters of state around the cabinet between minister and minister and minister and adviser? The basis of this contention is the confidential character of the cabinet proceedings derived from the concept of collective responsibility. The Attorney-General contended that the court should restrain any disclosure thereof if the public interest in concealment outweighed the public interest in the right to free publication.

The opposite argument was that the convention was not absolute and rested on an obligation founded in conscience only. Hence publication of diaries was not capable of control by the courts. Referring to these two arguments and voluminous evidence on both sides, by distinguished jurists and politicians, Lord Widgery said,

> It seems to me that the degree of protection afforded to cabinet papers and discussions cannot be determined by a single rule of thumb. Some secrets require a high degree of protection for a short time. Others require protection until a new political generation has taken over. In the present case, the Attorney General asks for a perpetual injunction to restrain further publication of diaries in whole or in part. I am far from convinced that he has made out a case that the public interest requires such a draconian remedy when regard is had to other public interests, such as the freedom of speech

He also accepted the need for protection of advice given by civil servants, but not without close investigation, as a matter of course, for a period of years Legally extending the Argyll powers[22] in regard to domestic secrets to official secrets, Lord Widgery said that the courts should not be powerless in this sphere, and, therefore, when a cabinet minister receives information in confidence, the improper publication of such information can be restrained by court and his obligation is more serious than merely to observe a gentleman's agreement.

He further decided the issue by saying,

> In these actions we are concerned with the publication of diaries at a time when eleven years have expired since the first recorded events . . There must, however, be a limit in time after which the confidential character of information and the duty of the court to restrain will lapse.

[22]Argyll *vs* Argyll (1967 Ch. 302) upholding in confidential relationship independently of any law

In the case of the diaries of Crossman, that stage, in the opinion of the judge, had been reached and so their publication was allowed

In regard to the fact that the diaries disclosed the advice given by civil servants who cannot be expected to advise frankly if that advice is not treated as confidential and also of the confidential character of the observations about the capacities of senior civil servants and their suitability for specific appointments, the judge's remarks are very telling. He said,

> I can see no ground in law which would entitle the court to restrain publication of these matters A minister is no doubt responsible for his department and accountable for its errors even though the individual fault is found in his subordinate . To disclose the fault of subordinate may amount to cowardice or bad taste, but I find no ground for saying that either the Crown or the individual civil servant has an enforceable right to have the advice which he gives treated as confidential for all time

Perhaps in taking this view the judge was influenced by the view that candour, frankness and freedom of advice do not always lead officials to tell the minister exactly what they think of him. There are sometimes difficulties about ministers' checking advice with other people The test of advice by the outcome is limited by the long lags in the results of policy and the advice on alternatives is not testable by later administration or by outside investigation

The principle of confidentiality of advice is said to be a survival of a concept of government, when the governing class, under pressure, did not feel it necessary honestly to account for their action and where the authority necessary to the government was maintained as a mystique rather than by articulation of people's aspirations illuminated by an understanding of the practicalities

EXTENSION OF THE LAW OF CONFIDENCE

The Crossman case judgement answered one question, but exposed and left unanswered several more The most positive long-term result was the extension of the law of confidence into the area of public affairs Politicians, civil servants and, presumably anyone else remotely concerned in public life, now has a right to go to court to try his luck against an editor or a journalist or a writing colleague to restrain them from publishing The effect could be to confine quite substantially the already restricted information about the business of the government In contrast to this, the second main effect of the judgement was to destroy the principle, as an inexorable principle of cabinet secrecy. By letting volume I to be published, Lord Widgery did more than that. Absolute assertions were made by Lord Gardner, Lord Hailsham and

Sir Peter Rawlinson in their evidence during the case that publication of diaries will inhibit 'free discussions' by ministers, tendering of 'proper advice' in future, and restrict discussions amongst them from being 'ultimately frank and unreserved'. After Widgery such assertions cannot be made with the same lofty and unchallengeable certitude. The judgement showed that they are not unassailable truths, but debatable assumptions, subject to review in each particular case. It cuts back the power of the executive and shows that judges will no more be dazzled by the cry of cabinet secrets. The theory of such records being governed by the thirty-year rule in the Public Records Act and the quasi-vetoing process of the secretary of the cabinet has also been exploded.

Negatively, so far as giving future guidance is concerned, the law has now been left more uncertain. It left the celebrated parameters only as the starting point and if suggestions of cabinet office in regard to the omission were to be disregarded, there was no indication or ruling about the time span during which the law of confidence could be invoked. Sir Anthony Nutting giving an account of the Suez affair in his book 'No End of a Lesson'[23] gave three reasons as to why he chose that time for publication. First, he thought that he owed it to history due to his inside knowledge of the operation; second, he wanted to clarify his stand with regard to the charge of betrayal of his friends after a lapse of ten years when national interest was not the end.. .; and, third, so that the participants in the drama were still alive to answer for themselves, if they so chose. The judge did not lay down any specific criteria for future publication.

The wide range,of uncertainty thus created was felt after the case was over. The Radcliffe Committee, appointed on April 11, 1975 to review this matter reported in 1976.[24] The Committee argued against regulation by the statute and seemingly discouraged further memoirs being tested in the court of law. In a revealing sentence the Committee wrote:

> The reasons that persuade us that confidentiality is a value that it is important to maintain in this special field of governmental relations do not lead us to think that a Judge is likely to be so equipped as to make him the best arbiter of the issues involved. The relevant considerations are political and administrative.

The Radcliffe Committee clarified and strengthened the cabinet secretary's role. Existing conventions were amplified and hardened. Apart from matters covering national security and foreign relations, confidentiality to be observed by all former ministers as regards the opinions of their colleagues, the 'advice received from officials, and assessments of their subordinates were

[23]Anthony Nutting, *No End of Lesson*, London, Constable, 1967.
[24]Radcliffe Committee Report (1976) CMND 6386 HMSO.

to be kept confidential for at least fifteen years after the events. Thus, where until Crossman, there were no parameters and no time limit with reference to availability of material, new parameters are endorsed and a quasi legal concept introduced with the introduction of a fifteen years rule. But the Committee recommended that compliance should be allowed to rest on the free acceptability by the individuals concerned of an obligation of honour. The government accepted the Committee's recommendations in full, as announced by the then PM, Harold Wilson, in a parliamentary answer on January 22, 1976 Thus, the more lasting effect, ironically enough, of Crossman, was to produce a tightening of the flow of information, not the loosening which he so fervently desired and cherished.

So much in regard to the disclosure of matters with which the ministers have to deal with. As we have observed earlier, due to various factors, the concept of ministerial responsibility is being redefined and modified and so also anonymity of civil servants We have also briefly noted the effect created by the need of closer contact between public servants and the public—including the press. Departments of government are engaged in formulating or implementing policies or advising their minister on the formulation or implementation thereof in certain defined fields All of those fields concern the public in one form or another; and it is in public interest that they are able to inform and advise their ministers in terms of, among other things, the probable impact of whatever they propose to do on the public. Then, down the ladder, the policies are executed in the field and thereby affect individuals or groups of individuals or institutions or companies. All sorts of problems arise which may get smoothened with more openness on the part of the implementing agencies like regional boards or councils or departments or their officials

The Franks Committee was appointed in April, 1971 'to review the operation of Section 2 of the Official Secrets Act, 1911 and to make recommendations'. Evidence from government witnesses and others did indicate to the Committee that Section 2 has some effect in creating a general aura of secrecy As a result, some civil servants are less forthcoming than they would otherwise This applies more to junior civil servants and some of the evidence suggested that those working in the provinces are more affected than those in London.[25]

BASTIONS OF SECRECY

Some jurists have considered that in UK there are four bastions of official secrecy and reticence. These are: concealment of departmental mistakes by

[25]Report of the Departmental Committee on Section 2 of the Official Secrets Act. *op. cit.*, Vol. I, p. 31.

ministerial responsibility, crown privilege to suppress evidence in litigation, non-disclosure of inspectors' reports after public inquiries and, of course, Section 2 of the Official Secrets Act, 1911, the review of which was the subject matter of the Franks Committee. We have noted earlier that the doctrine of ministerial responsibility is eroding and the Parliamentary Commissioner for Administration provides remedy for individual grievances. The abuse of crown privilege is rendered innocuous by a 1968 ruling[26] of the House of Lords and government is now subject to a law which will disallow excessive claims Before the Committee on Tribunals and Enquiries, 1957, government departments argued desperately against disclosure of reports of inspectors, who held public inquiries, on grounds of consequent embarrassment to ministers, administrative impracticability and impairing frankness These arguments were rejected and such disclosures have resulted in considerable improvement in procedures and public relations.[27] The catch-all character of Section 2 is widely accepted. It is said to lower the reputation of public service, since it is thought to be used for covering up mistakes, even when this is not true and is credited with having aggravated the secretiveness for which British administration has a bad name with the best informed critics from the Fulton Committee[28] to Crossman.[29] Perhaps, that explains the much quoted remarks of Justice Caulfield in the *Sunday Telegraph* case that Section 2 should be 'pensioned off'.

The stock argument for maintenance of the *status quo* is that it rests ultimately with ministers in UK to settle how far the disclosure of information should be authorised; and the political decision is in no way inhibited by Section 2.[30] Indirect influence of the views and attitudes of a new minister towards openness would change the atmosphere in the same way as the new headmaster does in a school and people do begin behaving differently. But then one cannot too often depend on the unpredictable comings of the 'headmasters' in a department or administration and on their whims and fancies. Some consistency and continuity of policy is necessary and desirable in this behalf. Dealing with this and similar arguments used in the White Paper of 1969, 'Information and Public Interest', Prof. H.W.R. Wade pointed out that it was being claimed as a virtue of the system that it actually did not penalise authorised disclosure which was in contrast with an enforceable legal right to the disclosure of a great deal of official information under the American and Swedish laws. Hence it was suggested to the Franks Committee to replace Section 2 with legislation which may assist the public in obtaining

[26]Conway *vs* Rimmer (1968) AC 910.
[27]Report of Committee on Tribunals & Inquiries, 1957 CMND 218 HMSO.
[28]Fulton Report on the Civil Service, *op cit.*
[29]Crossman, *The New Statesman*, 24 September, 1971.
[30]Report of the Departmental Committee on Section 2 of the Official Secrets Act, *op. cit.*

information about government on that pattern. The objective of the Swedish Act is:

> to provide free interchange of opinions and enlightenment of the public, every Swedish citizen shall have free access to documents in the manner specified below.

And in signing the American Act, President Johnson said, "A democracy works best when the people have all the information that the security of the nation permits". Section 2 as it stands repudiates this policy[31]

The Franks Committee, however, felt restricted by their terms of reference and found that the question of recommending legislation on the lines of the Swedish and US laws on public access to official documents "raised important constitutional questions going beyond our terms of reference". They did not go fully into this question, but believed that to the extent there was a connection between openness in government and law relating to official information, their proposals to replace Section 2 with much narrower ones would represent a move towards greater openness.

But the Committee did make certain observations on this question which do deserve a mention. First, they rightly referred to an extensive list of the kinds of documents in the US and Sweden which are excepted from the right of public access Both laws are drafted in a way so as to protect internal processes of government from disclosure In Sweden, an exception is made 'for working papers' prepared by the concerned authority before reaching a decision and the US laws are in terms of presettled decisions and procedures and identifiable documents Second, constitutional arrangements, political tradition, national character, habits and ways of thought do have an impact on the system which may be suitable. US and Sweden have both written constitutions and a system of separation of powers unlike the British system which is based on parliamentary control with a strong executive In this context, the British position is comparable to Canada which also has a system of protection of information analogous to Section 2.[32]

This is hardly the place for a critical review of the provisions for disclosure of information in different countries. However, such a study has revealed that in other democratic countries, discretionary release of information is considered inadequate for a full understanding of a policy area, if pressure groups, journalists and academics are able to be watch dogs alongside the legislature, ready to expose the inadequacies and shortcomings of the executive and they have pressed for the right to take the initiative in requesting documents

[31]Evidence Prof H.W R. Wade (Professor of English Law, Oxford University). Report of the Departmental Committee on Section 2 of the Official Secrets Act, *op cit.*, pp 414-16.

[32]Report of the Departmental Committee on Section 2 of the Official Secrets Act, *op cit*, Vol. I, pp. 35-36.

and information. In Scandinavia, little use has been made of the right of access provisions In Denmark, when the revised law was introduced in 1970, a rush of inquiries was expected, but this did not happen. The Swedish experience is largely that of individuals seeking records maintained about themselves relating to tax, social services and the like. Press is the chief user in these two countries and in Norway so far as the general policy documents are concerned. In US, the demand has been much more varied and substantial. Individuals seeking information on themselves form the largest group. But the press has been the chief beneficiary. Where the American experience differs from the Scandinavian is in the number of litigations* which have followed a large number of requests from lawyers representing corporations and firms with a view to arming themselves against competition with rivals or against possible investigations by the government. No doubt, the cost of enforcement has been stupendous in US and the law enforcement officials almost universally believe that ability of those agencies to gather and exchange information is being eroded.[33] The administrative impact in certain federal agencies has been pronounced But many inside and outside government believe that the Acts have conferred significant benefits, including reducing unnecessary secrecy, making officials more sensitive to public reaction to the advice they tender and forcing government to improve its system of record keeping [34]

So much for the overseas experience in open government, to put the problem in perspective Now let us briefly take up the thread from the Franks Committee's report in September 1972 and complete the story. While the recommendations were being studied, publication of the Crossman diaries, and the historic trial which preceded it, did finally result in tightening the flow of information from publication by former ministers (and also former members of public services) of memoirs and other works relating to their experiences concerned with confidential relationships before the expiry of 15 years [35] That situation continues

RECENT LEGISLATIVE STEPS

With a view to implement, with modifications and additions, the recommendations of the Franks Committee, a Protection of Official Information Bill was introduced in parliament This Bill, because of a provision permitting

* 500 court rulings have been given by the Supreme Court, 900 law suits pending under FOIA and 200 under Privacy Act. Refer 34, p. 25.

[33]Report by Comptroller General on November 15, 1978 on the impact of Freedom of Information Act, 1974 and Privacy Act, 1974 on law enforcement agencies to the Committee on the Judiciary, US Senate (LDC-7-119).

[34]Disclosure of Official Information, p. 29—A Report on Overseas Practice (1979), Civil Service Department, HMSO.

[35]Radcliffe Committee Report, *op. cit.*, paras 3 and 12

ministers to rule at their discretion (which the courts will not be able to question) that the disclosure of certain government information "is likely to cause serious injury to the interests of the nation or endanger the safety of the citizens", ironically enough, has been widely considered, both in the press and parliament, to be more oppressive than the existing Official Secrets Act [36] Perhaps, that is why 'The Guardian' called on backbenchers, whose own rights would look to be at stake, to be ready to join forces against the collusion of the two front benches—the labour front bench, which drafted the Bill, with many of the same provisions during Mr. Callaghan's Government, and the conservative front bench which now blithely accepts even those parts of the Bill against which it protested when in opposition [37] The Bill, however, has since been dropped as a sequel of the Blunt episode — involving the exposure by a journalist[38] of a UK citizen as the fourth man in the Philby affair, who was a Russian spy during World War II after almost three decades during which he was knighted and served as an honorary art adviser to the Queen. While dropping the Bill, the government said that it considers that its main duty is "for the efficiency and morale of the security services For that we must recognise they can only do so if they have considerable element of secrecy".[39] Who knows what further provisions for secrecy are required?

In this situation one does feel that perhaps there was quite some truth in the statement made by a promient journalist in his evidence before the Franks Committee. To quote his words,

> You quite clearly have a clash between the Government's desire to carry on its affairs efficiently and secretly, and the public's desire, which we represent, to know what is happening in order that they can influence events, and they cannot influence events unless they have the information It is a belief which a number of politicians have expressed when they have been in Opposition that they are in favour of more open Government, and when they actually arrive in Downing Street in the Cabinet room they seem to change their minds [40]

It seems the government shares the Franks Committee's view of delinking review of the Official Secrets Act with the issue of public right of access to state information This was confirmed by the Lord Chancellor on

[36] Protection of Official Information Bill 1979, *op cit*, Section 9.
[37] *The Guardian*, November 5, 1979.
[38] Andrew Boyle, *The Chamber of Treason*, 1979, London, Hutchinson
[39] *The Times*, November 21, 1979
[40] Charles Wintour (Editor, *Evening Standard*) Report of the Departmental Committee on Section 2 of the Official Secrets Act, *op. cit*, p. 41, Vol IV.

November 5 last in the House of Lords. When referring to the aforesaid Bill, he said,

> There is no intention to couple this Bill with the totally different and potentially more controversial issue—whether and to what extent we should follow the USA and give the citizen the general right, legally enforceable through the courts, of access to Government files.[41]

A word about some steps on the positive side of secrecy—official and unofficial—at this stage will be relevant Despaired of government's interest and initiative, a private member's Freedom of Information Bill was introduced in parliament and had its second reading in November 1979. Before that the then PM had appointed in 1977 a cabinet committee of civil servants to prepare a variety of open government schemes to buy off the Private Member's Bill, if it ever became near becoming the law. In July 1977, Lord Croham, head of civil service, saddled the government with an open government directive asking various departments to release as much background information on decisions as possible and to keep lists of material released under that policy for supply to members of parliament and journalists. On June 20, 1979, the new PM is credited to have amended the Croham directive and abolished the aforesaid committee. The statement of Paul Channon, State Minister for Civil Service and Francis Pym, Secretary of State for Defence, in June 1979 assured release of "as much information as possible including background papers". The PM's personal injunction to openness takes the form of a letter of June 20 by her principal private secretary—marked 'confidential'—ensuring secrecy on the directive on open government! Efforts of the press to know more elicited a confirmation from the PM's press secretary about the issue of a directive to this effect, but nothing more The spokesman omitted to mention that the directive also contains a declaration of government's intention not to introduce legislation to establish the right of access to official information and that no further formal steps will be taken[42]

Whitehall and others have consistently argued against a freedom of information law on the ground that it would be inappropriate mainly because ministers in UK—unlike those in US, for instance—are accountable to parliament for both their actions and for those of their civil servants and there is also the Parliamentary Commissioner Act Canadian experience in openness in government was considered particularly relevant because of the similarity of the British and Canadian constitutions and practice The introduction of a similar Bill by the Canadian Government in November 1979 knocks down such an argument For the first time such a law has been proposed in a country

[41]*The Guardian*, November 6, 1979.

[42]*The Times*, November 27, 1979, "Secrecy Shrouds No 10 'Directive on Open Government' "

whose constitution is modelled on Westminster and on the British parliamentary system. Under the Bill "instead of everything in the government's possession being secret unless decided otherwise", the president of the Canadian Privy Council told Canadian MPs, "everything will now be public unless declared secret, under precise terms defined by parliament" In the event of a dispute, ministers will not be able to withhold documents from the courts, who will be empowered to disclose the documents if they conclude that it is in the public interest to do so The whole tenor of the Bill is in marked contrast to the Protection of Information Bill prepared by the British Government (and dropped recently) which provides no appeals against classification of documents by civil servants nor against a minister's certificate, which will by itself be conclusive, that a disclosure has caused serious damage [43]

Michael Meacher, MP, whose Freedom of Information Bill is before the parliament continues to challenge 'why are we so secretive about the secrets' and the examples he gives are of great consumer interest For example, both Britain and US ban some food additives having adverse safety tests While in US, the text results are open to public, in Britain even data already published by UN and other public sources is clamped. Again in UK, harbour masters and health authorities are secretive about passenger liners having high rates of food poisoning; in US such disturbing deficiencies of some British liners are made known to American consumers and travel agents Meacher concludes that "official secrecy has much more to do with protecting the government of the day from embarrassment than with the nation's security" [44] One is tempted to quote Crossman's apt remarks on the subject which lend support to Meacher:

> Of course if you are running a show you hate any leaks about yourself and things that are embarrassing if they come out It is extremely difficult to distinguish something which infringes public interest and something which is highly inconvenient to you as a civil servant or politician and in my experience these distinctions are not made at present People want to have secrecy for good, bad and indifferent reasons

Meacher's Bill has a long way to go, if at all it proceeds In challenging the cult of secrecy in Britain today, hard is the way and strait the gate. The road is long and is strewn with difficulties Where and when the struggle will end, it is hard to tell, but is interesting to watch [45]

□

[43] *The Guardian, op cit*

[44] Michael Meacher, "Why Are We So Secretive About Our Secrets", *The Times*, November 20, 1979

[45] Report of the Departmental Committee on Section 2 of the Official Secrets Act, *op cit.*, Vol IV, p 73

Personal Privacy in the United States*

N.K.N. Iyengar

THE PRACTICE of keeping records about individuals in the United States has undergone dramatic changes during the last three decades. This is mainly due to rapid urbanisation, industrialisation and recent technological advancements, especially in the field of electronics and computers. The expanding role of the federal government in areas of economic and social life has also accentuated the need for more information about individuals in regulating the affairs of society.

Record keeping about individuals now covers almost everyone and influences everyone's life. Each individual plays a dual role in this connection —as an object of information gathering and as a consumer of the benefits and services that depend on it. The Americans live inescapably in an 'information society' and few of them have the option of avoiding relationships with record keeping organisations. To do so, is to forego not only credit but also insurance, employment, medical care, education, and all forms of government services to indviduals

Improper relationship between record keeping practices and individuals can result in substantial harm to the persons concerned. Inaccurate, unfair or outdated records have caused individuals to be denied jobs, housing, insurance, education and other benefits. Irrelevant or discriminatory records also unfairly penalise the individual. Circulation of information that the individual regards as sensitive and confidential, even if it does not cause loss or benefit, may result in severe psychic damage

There is a growing societal concern that accumulation of information about individuals tends to enhance authority and, further, may lead to an imbalance between the individual's personal privacy interests and society's information needs "The heart of the 'privacy protection issue' is the nexus between uses that organizations make of records they keep about individuals and the effects such uses can have on each individual."[1]

*Personal Privacy in an Information Society: The Report of the Privacy Protection Study Commission, July, 1977.

[1]Willis H Ware and Carole W Parsons, "Perspectives on Privacy", *The Bureaucrat*, Vol 5, July 1976, p 143.

RIGHT TO PRIVACY

Several social scientists have attempted to distinguish the concepts of privacy and secrecy Both involve reduced observability and an increased potential to deny access to others. They, however, differ in the moral content of the behaviour which is concealed Secrecy implies the concealment of something which is negatively valued by the excluded audience and, in some instances, by the perpetrator as well Privacy, by contrast, protects behaviour which is either morally neutral or valued by society as well as by the perpetrators Privacy has a consensual basis in society, while secrecy does not There is an agreed upon 'right to privacy' in many areas of contemporary life; however, there is no equivalent, consensual 'right to secrecy' [2]

The idea that the right to privacy[3] is an essential attribute of personal and psychological freedom in modern democratic society has been hailed as the most exciting and influential legal development of modern American tort law. The notion that privacy could be given constitutional dimension was probably the most innovative achievements of the Warren Court [4] Although the right to privacy was loosely mentioned in various decisions of the Supreme Court it was not until the 1965 decision in *Griswold V Connecticut* that the issue of privacy came suddenly to the forefront.

The right to privacy, as it has emerged from Griswold and other decisions, is composed of three fundamental constitutional guarantees and has three principal dimensions. The first amendment of free speech and assembly is designed to safeguard the anonymity of political belief, and especially political association. It guarantees that the individual is not compelled to disclose publicly the content of his political beliefs or his membership in political associations The fourth amendment, certainly the core element in constitutional privacy, protects one's reasonable expectations of privacy by imposing stiff procedural requisites which must be met before a breach in the sanctity of one's physical location may occur. The third and most absolute component is the fifth amendment's ban on self-incrimination, a right which safeguards the innermost sanctity of a person's mind from compulsory governmental intrusion. The total effect of these guarantees is to create a zone of privacy around various personal interests that the government

[2]Carol Warren and Barbara Caslett "Privacy and Secrecy: A Conceptual Comparison", *Journal of Social Issues*, Vol. 33, No 3, 1977, pp 43-51. See C J Friedrich, "Secrecy Versus Privacy. The Democratic Dilemma", in J.R. Pencock and J.W. Chapman (eds), *Privacy*, New York, Atherton, 1971.

[3]The word 'privacy' is nowhere mentioned in the American constitution The constitutional guarantees, together with the demand for 'life, liberty and the pursuit of happiness', as enunciated by the Declaration of Independence, form the basis of the right to privacy, the theoretical context from which has developed the narrower law of privacy

[4]Isidore Silver, "The Future of Constitutional Privacy", *Saint Louis University Law Journal*, Vol 21, No 2, 1977, pp 211-280

cannot violate without showing proper justification.[5]

LEGISLATION OF FAIRNESS IN RECORD KEEPING

Although many issues in the 1960s and early 1970s were loosely grouped under the category of invasions of privacy, it is clear that many of the perceived problems had very little in common. Some of the actual or potential invasions of privacy involved physical surveillance or wiretapping; some involved mail openings or burglaries conducted by government agencies; others centred on harassment of individuals for political purposes; and still others concerned the unfair use of records about individuals [6]

The inquiry into these matters by a number of congressional committees did not share a common analytical framework nor were the distinctions among different types of privacy invasions sharply drawn. Nevertheless, they succeeded in focussing public attention on privacy issues and in amassing useful information regarding particular aspects of the privacy protection problem [7]

The Congress gave expression to society's strong urge in opening the records of federal government agencies to public inspection through the enactment of the statute—the Freedom of Information Act 1966 (FOIA). The Act allows any person to see and obtain a copy of any record in the possession of the federal government without regard to his need for or interest in it An agency can withhold a record that falls within one of FOIA exemptions but its determination to do so, if appealed by the requestor, must withstand administrative and judicial review.

In 1972 the Secretary's Advisory Committee on Automated Personal Data System was appointed by the Department of Health, Education and Welfare[8] (the DHEW Committee) to explore the impact of computers on record keeping about individuals and, in addition, to inquire into and make recommendations regarding the use of social security number After examining various definitions of privacy, the Secretary's Advisory Committee concluded that the most significant aspect of the way organisations keep and

[5]See R H Clark, "Constitutional Sources of the Penumbral Right to Privacy", *Villanova Law Review*, Vol 19, No 6, June, 1974, p 834. W.M. Beany, "The Right to Privacy and American Law", *Law and Contemporary Problems*, vol 31, 1966, pp 253-271.

[6]Report of the Privacy Study Commission, p 500

[7]U S Congress (1972), Records Maintained by the Government Agencies. Hearings before a Sub-Committee of Government Operations, House of Representatives, H R 9527 Ninety Second Congress, Second Session

U S Congress (1971), Federal Data Banks, Computers and Bill of Rights. Hearings before the Sub-Committee on Constitutional Rights of the Committee on the Judiciary, Senate Ninety Second Congress, First Session.

[8]Department of Health, Education and Welfare Secretary's Advisory Committee on Automated Personal Data Systems, *Records, Computers and the Rights of Citizens*, Washington D C., 1973

use records about individuals was the extent to which individuals to whom the records pertained were unable to control their use. The Committee advanced the concept of 'fair information practice' as the underlying rationale for the record keeping principles By focussing on the issue of fairness, the Committee explicitly recognised that personal data keeping is an essential societal function. However, the Committee was also emphatic in its assertion that as individuals and organisations, both, become increasingly dependent on the recording and use of personal information, it is proper for the holders of that information to assume their share of responsibility for its maintenance and use. Accordingly, to strike a balance between institutional and individual prerogatives, the Committee recommended a 'Code of Fair Information Practices' based on five principles:

1 There must be no personal data record keeping systems whose very existence is secret.
2 There must be a way for an individual to find out what information about him is in a record and how it is used.
3 There must be a way for an individual to prevent information about him obtained for one purpose from being used or made available for other purposes without his consent
4 There must be a way for an individual to correct or amend a record of identifiable information about him
5. Any organisation creating, maintaining, using or disseminating records of identifiable personal data must assure the reliability of the data for their intended use and must take reasonable precautions to prevent misuse of the data.

These five principles enunciated by the DHEW Committee provided the necessary intellectual framework for the Privacy Act of 1974 (Public Law 93-579) [9] The main objective of the Act is to ensure that the records a federal agency maintains about an individual are as accurate, timely, complete and relevant as is necessary to assure that they are not the cause of unfairness on any decision about the individual made on the basis of them. Proper management of records about individuals is the key to this objective, and the Privacy Act seeks to enlist the individual's help in achieving it by giving him a right to see, copy and correct or amend the records about himself

The Fair Credit Reporting Act (FCRA) and the Fair Credit Billing Act (FCBA) also focus on fairness in record keeping, though their scope of application and their specific requirements differ from those of the Privacy Act FCRA requirements apply primarily to the support organisations which

[9]See Hugh V. O'Neill, "The Privacy Act of 1974· Introduction and Overview", *The Bureaucrat*, Vol 5, July 1976, pp 131-141. See also Willis H Ware and Carole W Parsons, "Perspectives on Bureaucracy. A Progress Report," *The Bureaucrat*, Vol 5, 1976, pp 141-156

verify and supplement the information a credit, insurance or employment applicant divulges in those three areas, but which do not themselves participate in the decisions about applicants.

Other recent legislations centering on fairness in record keeping includes the Family Educational Rights and the Privacy Act of 1974 and the several state fair-information-practice statutes. With the exception of the Privacy Act, which had a strong backing from the Ford Administration, the initiative for each of these laws has come primarily from the legislative branch.[10]

The Privacy Act is intended primarily to provide access by individuals to certain records maintained about them by federal agencies except for reasons set forth in that Act. The operation of the Act is limited only to the executive branch of the federal government.[11] The legislative and judicial branches are not subject to the Act. Nonetheless, the Office of Technology Act (OTA)—a Congressional body—voluntarily published a notice of a system of records in the Federal Register on November 19, 1975.[12] The Office of Management and Budget (OMB) has been entrusted with the authority to issue interpretative guidelines and regulations and to give oversight and assistance to agencies in the implementation of the Act. This has been done primarily with a view to emphasise that the implementation of the Act is more a managerial than a legal effort.

In addition to OMB, certain other agencies have additional specific responsibilities: the Commerce Department issues standards and guidelines on computer and data security relevant to the Act, and the General Services Administration (Office of the Federal Register) issues publication guidelines for the Act.

PRIVACY PROTECTION STUDY COMMISSION

Section 5 of the Privacy Act created the Privacy Protection Commission to advise the President and the Congress on the extent, if any, to which the principles and requirements of the Act should be applied to organisations other than the agencies of the federal executive branch.

The Commission had seven members, three appointed by the President, two by the President of the Senate, and two by the Speaker of the House of Representatives[13] The Commission officially began on June 10, 1975.

The Commission was given the broad mandate to investigate the personal

[10]Willis H Ware and Carole W. Parsons, "Perspectives on Privacy", *op. cit.* p. 144

[11]Hugh V O'Neill and John P. Fanning, "The Challenge of Implementing and Operating under the Privacy Act in the Largest Public Sector Conglomerate—HEW," *The Bureaucrat*, Vol 5, July 1976, pp 171-188

[12]Robert P. Bedell, "The Privacy Act. The Implementation at First Glance," *The Bureaucrat*, Vol 5, July 1976, p. 158.

[13]David F. Linowes (Chairman), Willis H Ware (Vice-Chairman), William O. Bailey, William B Dickinson, Barry M. Gold Water Jr., Edward I. Koch and Robert J. Tennessen.

data record keeping practices of governmental, regional, and private organisations. The Commission had three major tasks to perform:

1. to make a study of the data banks, automated data-processing programmes, and information systems of governmental, regional and private organisations, in order to determine the standards and procedures now in force for the protection of personal information;
2. to make recommendation to the President and the Congress on the extent, if any, to which the principles and requirements of the Privacy Act of 1974 should be applied outside the federal executive branch—through legislation, administrative action, or voluntary adoption; and
3. to report on such other legislative recommendations as the Commission may determine to be necessary to protect the privacy of individuals while meeting the legitimate needs of government and society for information

As part of the study called for in task (1), the Commission was also required to report on five specifically enumerated issues·

1. whether a person engaged in inter-state commerce who maintains a mailing list should be required to remove the name and address of any individual who does not want to be on it;
2. whether the internal revenue service should be prohibited from transferring individually identifiable data to other federal agencies and to agencies of state government,
3. whether the individual who has been harmed as a consequence of wilful or intentional violation of the Privacy Act of 1974 should be able to sue the federal government for punitive damages
4. whether (and if yes in what way) the standards for security and confidentiality of records that the Privacy Act requires federal agencies to adopt should be applied when a record is disclosed to a person other than an agency; and
5. whether, and to what extent, governmental and private information systems affect federal/state relations and the principle of separation of powers.

The Commission's report containing 654 pages with 162 recommendations was presented to the President and to the Congress on July 12, 1979. The Commission made a detailed investigation of record keeping in credit, banking, insurance, employment, medical care, education and government among others.

The Commission's findings reflect the fact "that in American society today records mediate relationships between individuals and organizations and

thus affect an individual more easily, more broadly, and more unfairly than was possible in the past". The Commission's report rightly points out that "as records continue to supplant face-to-face encounters in American society, there has been no compensatory tendency to give the individual the kind of control over the collection, use and disclosure of information about him that his face-to-face encounters normally entail."

The report looks toward a national policy on personal data record keeping that minimises intrusiveness, maximises fairness, and defines obligations with respect to the uses and disclosures that would be made of recorded information about an individual. Its policy recommendations aim at strengthening the social relationships between individuals and record keeping organisations by enforcing enforceable rights and responsibilities. In explaining ways to implement its policy recommendations, the Commission was guided by three principles: (1) that incentives for systematic reform should be created, (2) that existing regulatory and enforcement mechanisms should be used insofar as possible, and (3) that unnecessary cost should be avoided

The vast majority of the Commission's recommendations relate directly to fairness in record keeping and generally call for reasonable procedures to assure accuracy, timeliness and completeness in records of information about individuals The Commission evolved the following general principles which could be applied to most information systems:[14]

1. To ensure relevance, government and private institutions should collect only that personal information necessary to perform their service or fulfil their function. There should be legally established guidelines limiting the collection of irrelevant personal information.
2. To ensure fairness, certain information getting techniques should be banned—among them, pretext interview (interview conducted under false pretences) and polygraph (lie-detector) tests administered as a condition of employment. The latter are offensive for two reasons. First, part of the technique for establishing a 'truth' level is to ask deeply probing questions not related to the aim of the test, thus eliciting information that an individual normally would not volunteer; second, by their very nature, polygraph tests are coercive. And as a practical matter, their accuracy and reliability are open to question.
3. To ensure secrecy, the subject of the record should be given access to it, and given the right to correct mis-statements, to challenge the sources used and to update the record. The right should be made available to everyone as a matter of course. As a further side to accuracy and fitness, government and private organisations should adopt disposal schedules where appropriate.

[14]See David F. Linowes, "Counterattacking the Privacy Invaders", *Politics Today*, November/December 1978, pp 36-41.

4. To ensure confidentiality, the subject should be a participating source. The use of blanket consent form should be eliminated. Instead, the individual should be informed in advance about any proposed transfer of personal information If that proposed transfer does not serve the original purpose for which the information was first given, then the individual should have the right to authorise the transfer. Each subsequent transfer should be made only with the informal consent of the individual. Organisations that violate confidentiality rules should be liable for civil damages.

Recognising the limitations of its recommendations in a fastly changing technological American society, the Commission concluded:

> the Commission's resolution of particular issues should not be taken as answers for all time. Though the structure proposed for resolving problems is designed to survive, changes in technology and social organization may bypass particular solutions recommended in the report. As long as America believes as more than a matter of rhetoric, in the worth of the individual citizen, it must certainly re-affirm and reinforce the protections for the privacy, and ultimately the autonomy, of the individual.

Thirteen Bills based on the Privacy Commission's recommendations were introduced in the Congress during the summer of 1977 Hearings were held on these Bills in May 1978 before the government information and individual rights sub-committee of the committee on government operations. The US Chamber of Commerce, the National Business Round Table and the American Bankers Association are all developing privacy protection guidelines for their members in accord with the Commission's findings and recommendations.



Freedom of the Press in Sweden

[Freedom of the press is a constitutional right in Sweden. We give below the 'Fact Sheet on Sweden' describing the general background of press freedom in that country.]

The first law on the freedom of the press in Sweden was passed in 1766, but like its successors this law was repeatedly abrogated and not until 1812 was there any enduring and effective legislation. The 1812 law remained in force until 1950 and today it is still the basis of the current legislation.

The Freedom of the Press Act in Sweden is a constitutional law, which means that it is sustained by rigid constitutional guarantees. Thus a Riksdag decision on a change in this Act would have to be held over until confirmed by a newly-elected Riksdag. The foundation of the freedom of the press legislation is contained in paragraph 86 of the Constitution: "Freedom of the press means the right of every Swedish citizen to publish matter, without previous hindrance by any authority, which subsequently is only punishable before a court of law. All public documents may unconditionally be published in print, unless otherwise prescribed in the Freedom of the Press Act."

THE PRINCIPLE OF PUBLICITY

By the terms of the Act, everybody—Swedish citizens and aliens alike—shall in principle have access to all public documents This unique 'principle of publicity', subsequently adopted by the neighbouring countries of Denmark, Finland, and Norway but otherwise without parallel, has come to be considered indispensable to the Swedish press as a Fourth Estate supervising and criticizing the authorities

The principle applies to documents of both central and local government institutions but not to government-owned business firms, state or municipal trading or manufacturing agencies. There has been a certain tendency in recent years to adopt business forms for handling public affairs, though the reason for this is not so much anxiety on the part of the authorities over public insight into their activities but rather the fact that in certain types of administration, particularly the business sector, company procedure greatly facilitates the work in general

For a document to be classified as public it must be held by a government or local authority, whether it is of official or private origin. Delay or failure to register a document does not deprive it of its status as public and available to people in general In certain cases, however, documents do not become public until the matter involved has finally been settled, for example, administrative decisions which have to be effected, and likewise verdicts Minutes become public when they have been checked and reports, registers and diaries when they are completed.

A non-confidential document shall be available for reading or copying to anyone who requires it. An individual also has the right to order a copy from the authorities although there are exceptions to this rule in the case of certain local government documents. Application for a particular document is made to the authority who holds it This is an informal procedure, however, which can be made either in writing or verbally and the document is issued free of charge.

The person dealing with the matter in question is responsible in the first instance for issuing a document which has been applied for. If, however, he is not prepared personally to accept such a responsibility the matter is referred to the relevant authority

In certain instances it is not the authority holding the document who is responsible, for example, as regards documents concerning Sweden's relations with a foreign power, certain military documents and those involving the activities of the security police

THE SECRECY ACT

As can be seen from the above it can happen that an application for a document is refused Such a measure, however, must have the support of the 1937 Secrecy Act The Secrecy Act is not a constitutional law and it may thus be amended at short notice Those aspects of public affairs where secrecy may be applied are prescribed in the Freedom of the Press Act as follows.

documents pertaining to national security and foreign policy;
documents concerning inspections, controls or measures against crime by the authorities,
documents of economic significance to national or local authorities.
documents relating to personal integrity, personal safety, and decorum and decency.

If the authorities reject an application for a specific document, the applicant is informed of whom he shall appeal to against this decision The decision of a cabinet minister cannot be appealed against, however. Lawsuits relating to the issue of public documents are regarded as being of special importance and are always given priority.

THE SECRECY STAMP

The secrecy stamp is used in Sweden in order to avoid issuing secret documents through carelessness or ignorance. These are specially stamped with a reference to the relevant paragraph of the Secrecy Act, and the date and official concerned This in itself does not make a document secret but it serves as a reminder if, for example, the document is transferred from one office to another

The degree of secrecy afforded a document depends upon the matter which has to be protected Maximum secrecy duration is seventy years from the date of the document This prolonged period of secrecy involves matters relating to personal integrity, for example most of the social welfare authorities' papers Foreign policy secrecy duration is fifty years and then there is a sliding scale of secrecy periods down to two years It should be remembered here that a party in a lawsuit has in principle full access to any documents relating to him In other words secrecy is directed at outsiders There are instances, such as mental illness or alcoholism, where an individual in the care of the authorities is not permitted access to secret papers in his case history

NO CENSORSHIP

The Freedom of the Press Act does not permit any form of censorship and it likewise forbids fundamental restrictions on printing and distribution These regulations, however, apply only to the public authorities, so that private concerns or organizations can take measures to prevent or even prohibit publication Ninety per cent of the news stand sales of papers and magazines in Sweden is handled by a cooperative organization owned by the press and known as the Swedish Press Bureau The Press Bureau is committed to a policy of impartial distribution of all forms of publications, subject only to a legal ban on the *display* of pornographic literature.

While lawmakers have explicitly forbidden censorship by the government, they have also attempted to prevent 'internal' censorship by conferring total and exclusive responsibility for the contents of a periodical publication on its 'responsible publisher'. He is appointed by the owner of the publication, who is obliged to notify the Ministry of Justice of the appointment The publisher then retains his position until the owner dismisses him and employs someone in his place To be a publisher one must be a Swedish citizen, domiciled in Sweden and neither a minor nor an undischarged bankrupt.

RESPONSIBILITY

Through the press responsibility system in freedom of the press offences only the publisher can be charged. If the publisher is found to be fictitious the responsibility rests with the owner and if for some reason he cannot be prosecuted then the printer is held responsible. Finally, and this regulation applies principally to foreign publications imported into Sweden, the distributor may be held responsible In the matter of damages, moreover, both the owner and the publisher may in certain cases be held responsible. It is generally felt that this system functions very well in Sweden, even if its structure conflicts with certain fundamental legal principles Probably in most cases the publisher never sees, never has time to see, an article for which he may later be prosecuted A publisher cannot hope to check every item, contribution and article in a large daily newspaper of 50-60 pages, for example. This same publisher is likewise responsible, in principle, for all the advertisements and, naturally. for published letters and other such contributions

FREEDOM OF THE PRESS OFFENCES

The Freedom of the Press Act specifically prescribes what are the offences under this law and some of the more common of these are mentioned here.

One category includes various forms of libel and defamation, racial prejudice, treasonable writing and the spreading of false rumours which may harm the country or the authorities.

Another category embraces the publicising of secret documents or the disclosure of information which may threaten national security, and also the publishing of in-camera proceedings.

The special responsibility regulations apply only to carefully defined freedom of the press offences. There are numerous offences, which are not included in these, for example copyright violations and mail order and advertising frauds where the usual criminal laws may apply.

ANONYMITY ASSURANCE

Anyone working for a newspaper or a magazine has the right to anonymity. Anonymity protection works in the same way as the publicity principle. The purpose is to ensure and protect the press's access to information, without risk of reprisal against the informant Disclosure of the name of an informant or a correspondent without his or her permission is a criminal offence. But there are, of course, limits to anonymity protection Anyone offering a secret document for publication can be prosecuted and furthermore a witness called in a case which does not involve the freedom of the press may be put in a position where he has to disclose the name of an informant At present a strengthening of anonymity protection is under consideration. The giving away verbally of defence secrets is also a punishable offence.

SUPERVISING THE FREEDOM OF THE PRESS

This is handled by the Minister of Justice and a special staff. All printers must submit

one copy of everything they print, except job-printing such as visiting cards, to a freedom of the press official If the latter considers that a publication deviates from the prescribed limits he reports to the Minister of Justice, who may order its embargo personally or through a representative In certain cases the police may impound a publication upon notification by the general public, subject to approval by the Public Prosecutor The police are empowered to search the premises of printers, retailers and distributors, but not private persons who may already have acquired the publication in question.

In freedom of the press cases the prosecutor is the Chancellor of Justice If the Minister of Justice has ordered embargo, he must immediately submit a copy of the subject publication to the Chancellor of Justice, who must decide within 14 days whether or not to prosecute and confiscate Failing this, the embargo order is null and void

FREEDOM OF THE PRESS LAWSUITS

The privileged legal status accorded to the press is emphasized by the adoption of the jury system in the press courts of Sweden, where juries are alien to all other sectors of the administration of justice The task of the jury is to confirm or deny specific questions addressed to it by the court concerning the guilt of an accused publisher The jury comprises nine members and the parties have the right beforehand to reject any jury member they might consider unsuitable At least six members must agree for a conviction It is possible for the court itself to make an acquittal, despite the jury's verdict of guilty But if the jury returns a verdict of not guilty the court cannot contest this finding It emerges quite clearly from this how well the freedom of the press is guaranteed There is, moreover, a special regulation prescribing that in uncertain cases the jury should preferably return a verdict of not guilty If both parties concur a trial by jury is not necessary

There are comparatively few freedom of the press lawsuits in Sweden, usually between ten and twenty a year, and this is because libel cases are often settled out of court The freedom of the press authorities do not intervene in libel suits, except in cases of libel against a public official

THE PRESS COUNCIL AND THE PRESS OMBUDSMAN

The Swedish Press Council is a private tribunal which deals with matters involving 'sound journalistic practices' It was founded in 1916 by the Publicists' Club, the Swedish Journalists' Union and the Swedish Newspaper Publishers' Association

After many years of debate on the Council's functions and several inquiries with suggestions for reforms, the three press organisations decided in 1969 to alter its membership and the rules governing its activities What used to be a strictly professional body has now been enlarged to include representatives of the general public One interesting innovation was to establish a new office called 'The General Public's Press Ombudsman' (PO), as a 'grievance commissioner' entrusted with 'prosecuting' violations of press ethics before the Press Council, the PO has no counterpart in any other country.

An associate judge of a court of appeal has been installed as the first Press Ombudsman He assumed office on November 1, 1969

OTHER MASS MEDIA

The Freedom of the Press Act applies to all printed matter, though not to stencils The regulations are largely the same for periodicals (published at least four times a year) and other printed matter (books)

Where non-recurrent publications are concerned, however, the publisher does not automatically carry exclusive responsibility The author of an individual book will normally

be legally responsible for its contents. Only if he prefers to remain anonymous or appear under an assumed name will responsibility be transferred to the publisher A Broadcasting Liability Act went into force on July 1, 1967 which is modelled on the Freedom of the Press Act. This law penalizes offences against freedom of speech on radio and television broadcasts, just as the Freedom of the Press Act regulates freedom of expression in printed matter. Every programme is under the responsibility of a designated person who shall guard against the commission of libel offences. The Radio Act of the same date prohibits censorship of a programme by public authorities and grants the exclusive right to one company to maintain a public broadcasting service. The task of ensuring that broadcast programmes observe required standards of objectivity and impartiality is entrusted to a special body of review, the Radio Council.

Unlike physical persons, juristical or artificial persons such as firms, organizations or institutions are not entitled to take libel action under Swedish law.

In this as in many other respects, freedom of expression—and the curbs on that freedom—are governed by the same basic principles for all mass media. A special commission has now been appointed to examine the feasibility of unifying and consolidating the various special laws into a single Constitutional Mass Media Law applying the principles of the Freedom of the Press Act to all media.



Document 2—Sweden

Freedom of the Press Act

(As Adopted by the Riksdag at its 1976-77 Ordinary Session)

[Sweden seems to have been the first country in the world to establish freedom of the press. In 1766, the Swedish Parliament adopted a Freedom of the Press Act as a part of Sweden's constitution There have been amendments to the Act subsequently and the latest are of 1976-77

[The Freedom of the Press Act has 14 chapters dealing with the several aspects of printing and publishing We reproduce here the first two chapters, and the articles under them, dealing with the general principles of freedom of the press and access to official documents, respectively]

CHAPTER 1 ON THE FREEDOM OF THE PRESS

Art 1.

Freedom of the press means the right of every Swedish national, without any hindrance raised beforehand by any authority or other public body, to publish any written matter, thereafter not to be prosecuted on account of the contents of such publication otherwise than before a legal court, and not to be punished therefore in any case other than such where the contents are in contravention of the express terms of law, enacted in order to preserve general order without suppressing general information

In accordance with the principles set forth in the preceding paragraph of this Article concerning freedom of the press for all and in order to ensure free interchange of opinions and enlightenment of the public, every Swedish national shall, subject to the provisions set forth in the present Act for the protection of individual rights and public security, have the right to express his thoughts and opinions in print, to publish official documents and to make statements and communicate information on any subject whatsoever

Any person shall likewise have the right, unless otherwise provided in the present Act, to make statements and communicate information on any subject whatsoever for the purpose of publication in print, to the author or any other person who shall be considered the author of a representation in such publication, to the editor or editorial office, if any, of any publication, or to an enterprise dealing commercially with the forwarding of news or other communication to periodicals.

It shall furthermore be the right of any person, unless otherwise provided in this Act, to procure information on any subject whatsoever for the purpose of its publication in print, or for the purpose of making statements or communicating information in the manner referred to in the preceding paragraph

Art. 2

No publication shall be subject to censorship before being printed, nor shall the printing thereof be prohibited

Furthermore, no authority or other public body may, by reason of the contents of a

publication, take any action not authorised by this Act to prevent the printing or publication thereof, or the circulation of the publication among the public.

Art 3.

Except in the manner and in the cases specified in this Act, a person shall not on grounds of abuse of the freedom of the press, or complicity in such abuse, be prosecuted, convicted under penal law, or held liable for damages, nor shall the publication be confiscated or seized

Art. 4.

Any person whose duty it is to pass judgment on abuses of the freedom of the press or otherwise to ensure compliance with this Act shall constantly bear in mind that freedom of the press is a foundation of a free society, always pay more attention to illegality in the subject-matter and thought than illegality in the form of expression, to the aim rather than to the manner of presentation, and, in doubtful cases. acquit rather than convict.

In determining the sanctions which under the present Act are attendant upon abuses of the freedom of the press, particular attention shall, in the case of statements requiring correction. be given to whether such correction was brought to the notice of the public in an appropriate manner.

Art. 5

The present Act shall apply to any matter produced by means of a printing press It shall likewise apply to any publication which has been multicopied by way of mimeographing, photocopying, or any similar technical process. if

1. there is a valid publishing licence for the publication; or

2 the publication is provided with a notation to the effect that it has been multicopied and, in connection therewith, gives clear indication as to the identity of the person who has multicopied the publication as well as the place where and the year when such multicopying took place.

Any provision of this Act which refers to matter produced by means of a printing press, or to printing, shall be applied, unless otherwise prescribed therein, *mutatis mutandis*, to any other published matter to which the Act is applicable pursuant to the first paragraph, or to the multicopying of such published matter.

The term 'published matter' includes pictures, even if there is no accompanying text.

Art. 6

Printed matter shall not be considered as such unless it is published. Printed matter shall be deemed to have been published when it has been delivered for sale or for circulation in some other manner; nevertheless, this definition shall not apply to the printed documents of an authority which are not available to the public

Art. 7.

The term 'periodical' refers to newspapers, magazines or other similar printed matter, as well as accompanying posters and supplements, provided that according to the publishing schedule the intention is to issue at least four separate numbers or sections of the publication under a fixed title at different periods during the year Printed matter shall be deemed to be a periodical from the time of issue of a publishing licence until such licence is revoked.

Art 8.

No privileges to publish written matter may be granted, provided, however, that such privileges for the support of public institutions as have already been granted may be renewed by the Government, each time for not more than twenty years

Provisions regarding the copyright due an author of a literary or artistic work, or due a producer of a photographic picture, and provisions prohibiting the reproduction of literary or artistic works in a manner that infringes the cultural interests shall be laid down by law

Art. 9

Notwithstanding the provisions of the present Act, rules laid down by law shall govern:

1 prohibitions against commercial advertisements insofar as such advertisements are used in the marketing of alcoholic beverages or tobacco products,
2 prohibitions against the publication, within the framework of any commercial activity for providing credit information, of any credit report which improperly infringes the personal integrity of an individual, or which contains an incorrect or misleading statement; liability to pay compensation on account of such publication; and correction of incorrect or misleading statements,
3 criminal or civil liability on account of the manner in which information has been procured

CHAPTER 2 ON THE PUBLIC CHARACTER OF OFFICIAL DOCUMENTS

Art 1

To further free interchange of opinions and enlightenment of the public every Swedish national shall have free access to official documents

Art 2

The right to have access to official documents may be restricted only if restrictions are necessary considering.

1. the security of the Realm or its relations to a foreign state or to an international organisation,
2 the central financial policy, the monetary policy, or the foreign exchange policy of the Realm,
3 the activities of a public authority for the purpose of inspection, control, or other supervision,
4 the interest of prevention or prosecution of crime,
5 the economic interests of the State or the communities,
6 the protection of the personal integrity or the economic conditions of individuals,
7. the interest of preserving animal or plant species

Any restriction of the right to have access to official documents shall be scrupulously specified in provisions of a specific act of law, or, if in a particular case it is found more suitable, in another act of law to which the specific act makes reference However, upon authorization by way of such provision the Government may issue, by a decree, more detailed regulations concerning the application of that provision

Notwithstanding the provisions of the second paragraph of this Article, it may be conferred, by way of such provision as referred to therein, upon the Riksdag or the Government to authorize, having regard to the circumstances, that a particular official document shall be made available

Art. 3.

The term 'document' includes any representation in writing, any pictorial representation, and any recording which can be read, listened to, or otherwise apprehended only by means of technical aids A document shall be considered to be official if it is kept by a public

authority, and if, pursuant to Articles 6 or 7, it shall be considered to have been received, or prepared, or drawn up by an authority.

A recording such as referred to in the preceding paragraph shall be considered to be kept by a public authority, if the recording is available to the authority for the purpose of being transcribed in such a manner that it can be read or listened to, or is otherwise apprehensible The foregoing provision shall not, however, apply to a recording which forms part of a register of persons, if by law, or by a decree, or by a special decision taken by virtue of an act of law, the authority is not entitled to make such transcription 'Register of persons' shall be understood to mean any register, list, or other notation containing information which concerns an individual and which can be related to that individual

Art 4.

A letter or other communication which is addressed personally to the holder of an office in a public authority shall be considered to be an official document if the document refers to a case or any other matter which rests with that authority, and if the document is not intended for the addressee merely in his capacity as holder of another position.

Art. 5.

For the purposes of the present Chapter the Riksdag, the General Church Assembly, and any municipal assembly vested with decisive power shall be on equality with a public authority.

Art. 6

A document shall be considered to have been received by a public authority when it has arrived at such authority or is in the hands of a competent official. Such recording as referred to in the first paragraph of Article 3 shall be considered instead to have been received by the authority when another person has made it accessible to the authority in the manner stated in the second paragraph of Article 3

Competitive entries, tenders, or other similar documents which, according to an announcement, must be delivered in sealed envelopes shall not be deemed to have been received before the time fixed for their opening.

Measures which are taken solely as part of technical processing or technical storage of a document which a public authority has made available shall not be construed to have the effect that the document has been received by that authority.

Art. 7.

A document shall be deemed to have been drawn up by a public authority when it has been dispatched A document which has not been dispatched shall be deemed to have been drawn up when the matter or case to which it relates has been finally settled by the authority, or, if the document does not relate to a specific matter or case, when it has been finally checked and approved by the authority, or when it has been completed in some other manner.

Notwithstanding the provisions of the preceding paragraph, such documents as are mentioned below shall be deemed to have been drawn up:

1) a diary or journal and such register or other list which is drawn up consecutively, when the document has been completed so as to be ready for notation or entry,
2. a judgement or other decision which, according to the relevant legislation, must be pronounced or dispatched, and minutes or other documents in so far as they relate to such judgement or decision when the judgement or decision has been pronounced or dispatched,

3. other minutes kept by a public authority and comparable records, when the document has been checked and approved by the authority or has been completed in some other manner; provided, however, that this shall not apply to minutes kept by Committees of the Riksdag or the General Church Assembly, by Auditors of the Riksdag or by Auditors of local authorities, by Government commissions, or by a local authority on a matter dealt with by the authority solely for the purpose of preparing the matter for decision

Art 8.

If a body or agency which forms part of, or is associated to a public authority or similar organ for public administration, has handed over a document to another body or agency in the same administration or has prepared a document for the purpose of such delivery, the document shall not be deemed thereby to have been received or drawn up unless the relevant bodies or agencies act as independent entities in relation to one another

Art. 9.

Neither shall a memorandum, which has been prepared in a public authority and which has not been dispatched, after the time when, pursuant to Article 7, it shall be deemed to have been drawn up, be considered to be an official document in that authority, unless it has been taken care of for the purpose of being filed By 'memorandum' shall be understood any *aide-memoire* or other notation or recording prepared exclusively for the purpose of preparation or oral presentation of a case or matter, but not in so far as it has added factual information to the relevant case or matter

Preliminary outlines or drafts of decisions or official communications of a public authority, as well as any other comparable document, which has not been dispatched shall not be deemed to be an official document unless it is taken care of for the purpose of being filed.

Art. 10

A document which is kept by a public authority solely for purposes of technical processing or technical storage on account of another person shall not be deemed to be an official document in that authority.

Art. 11

The following documents shall not be considered to be official documents

1 letters, telegrams or other such documents which have been delivered to or drawn up by a public authority solely for the purpose of forwarding a communication,
2 announcements or other documents which have been delivered to, or drawn up by, a public authority solely for the purpose of their publication in a periodical which is published under the auspices of the authority,
3 printed matter, sound or picture recordings, or other documents which form part of a library or which have been furnished public archives by a private subject solely for the purpose of storage and custody or for research or study purposes, as well as private letters, publications, or recordings which have otherwise been handed over to a public authority solely for such purposes as those referred to above,
4. recordings of the contents of such documents as referred to in sub-paragraph 3, if such recording is kept by a public authority where the original document would not be considered to be an official document.

Art 12

Any official document which may be made available to the public shall be made available, at the place where it is kept, and free of charge, immediately, or as soon as possible, to any

person who desires to have access to the document, in such manner that the document can be read, listened to, or otherwise apprehended. A document may also be copied or reproduced, or used for the purpose of transfer to a sound recording If a document cannot be made available without such part of it as may not be made available being disclosed, the remaining part of the document shall be made available to the applicant in the form of a transcript or a copy.

A public authority shall be under no obligation to make a document available at the place where the document is kept, if that would meet with considerable difficulties. Neither shall any such obligation arise in respect of a recording such as referred to in the first paragraph of Article 3, if the applicant can, without any considerable inconvenience, have access to the recording at a public authority located in the neighbourhood.

Art 13.

Any person who wishes to have access to an official document shall likewise be entitled for a fixed fee to obtain a transcript or a copy of the document or of that part of it which may be made available However, a public authority shall be under no obligation to make a recording for electronic data-processing available in any form other than a transcript Neither shall there be any obligation to produce copies of maps, drawings, or pictures, or of any other such recording as referred to in the first paragraph of Article 3 than has just been mentioned, if that would meet with difficulties and the document can be made available at the place where it is kept.

Art 14

Any request to have access to an official document shall be made with the public authority where the document is kept.

The request shall be examined and determined by the authority referred to in the preceding paragraph However, where special reasons so warrant, it may be prescribed in such provision as referred to in the second paragraph of Article 2 that, in application of that provision, the examination and determination shall rest with another authority. As regards a document which is of extreme importance for the security of the Realm it may also be prescribed by a decree that only a particular authority shall be entitled to consider and decide questions of making the document available In the cases now referred to the request shall immediately be submitted to the competent authority.

Art 15

If a public authority other than the Riksdag or the Government has rejected a request that an official document be made available, or if such document has been made available under reservations which restrict the applicant's right to disclose its contents or otherwise to make use of it, the applicant may lodge an appeal against the decision An appeal against a decision by a member of the Government shall be lodged with the Government, and an appeal against a decision of another authority shall be lodged with a court

In the Act referred to in Article 2 it shall be stipulated it detail how an appeal against such decision as referred to in the preceding paragraph shall be lodged An appeal of this kind shall always be considered and determined promptly

The right to lodge appeals against decisions by the Riksdag agencies is governed by special provisions

Art 16

A notification indicating restrictions of the right to make an official document available may be made only on documents to which such provision as referred to in the second paragraph of Article 2 is applicable In such a note the applicable provision shall be indicated

□

Freedom of Information Act

[The Freedom of Information Act in the United States was passed in 1966 There were two amendments to it, the first in 1967 and the other in 1974, both clarifying the provisions of the 1966 Act and enlarging the scope of access to official documents

[We give below in full the 1966 Act and the two amendments, 1967 and 1974]

PUBLIC LAW 89-487—1966

AN ACT

To amend section 3 of the Administrative Procedure Act, chapter 324 of the Act of June 11, 1946 (60 Stat. 238), to clarify and protect the right of the public to information, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3, chapter 324, of the Act of June 11, 1946 (60 Stat. 238), is amended to read as follows

Sec. 3 Every agency shall make available to the public the following information

(*a*) *Publication in the Federal Register* Every agency shall separately state and currently publish in the Federal Register for the guidance of the public (A) descriptions of its central and field organization and the established places at which, the officers from whom, and the methods whereby, the public may secure information, make submittals or requests, or obtain decisions, (B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available, (C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations, (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency, and (E) every amendment, revision, or repeal of the foregoing Except to the extent that a person has actual and timely notice of the terms thereof, no person shall in any manner be required to resort to, or be adversely affected by any matter required to be published in the Federal Register and not so published For purpose of this sub-section, matter which is reasonably available to the class of persons affected thereby shall be deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register

(*b*) *Agency Opinion and Order* Every agency shall, in accordance with published rules, make available for public inspection and copying (A) all final opinions (including concurring and dissenting opinions) and all orders made in the adjudication of cases, (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register, and (C) administrative staff manuals and instructions to staff that affect any member of the public unless such materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction *Provided,* That in every case the justification for the deletion must be fully explained in

writing. Every agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter which is issued, adopted, or promulgated after the effective date of this Act and which is required by this subsection to be made available or published. No final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects any member of the public may be relied upon, used or cited as precedent by an agency against any private party unless it has been indexed and either made available or published as provided by this subsection or unless that private party shall have actual and timely notice of the terms thereof

(*c*) *Agency Records* Except with respect to the records made available pursuant to subsections (a) and (b), every agency shall, upon request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute and procedure to be followed, make such records promptly available to any person. Upon complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated shall have jurisdiction to enjoin the agency from the withholding of agency records and to order the production of any agency records improperly withheld from the complainant In such cases the court shall determine the matter *de novo* and the burden shall be upon the agency to sustain its action In the event of noncompliance with the court's order, the district court may punish the responsible officers for contempt. Except as to those causes which the court deems of greater importance, proceedings before the district court as authorized by this subsection shall take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way

(*d*) *Agency Proceedings.* Every agency having more than one member shall keep a record of the final votes of each member in every agency proceeding and such record shall be available for public inspection

(*e*) *Exemptions* The provisions of this section shall not be applicable to matters that are (1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy, (2) related solely to the internal personnel rules and practices of any agency, (3) specifically exempted from disclosure by statute; (4) trade secrets and commercial or financial information obtained from any person and privileged or confidential, (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency, (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a private party, (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions, and (9) geological and geophysical information and data (including maps) concerning wells

(*f*) *Limitation of Exemptions* Nothing in this section authorizes withholding of information or limiting the availability of records to the public except as specifically stated in this section, nor shall this section be authority to withhold information from Congress

(*g*) *Private Party.* As used in this section, 'private party' means any party other than an agency

(*h*) *Effective Date* This amendment shall become effective one year following the date of the enactment of this Act.

Approved July 4, 1966

PUBLIC LAW 90-23—1967

AN ACT

To amend section 552 of title 5, United States Code, to codify the provisions of Public Law 89-487.

Be it enacted by the Senate and House of Representatives of the United States of America

in Congress assembled, That section 552 of title 5, United States Code, is amended to read.
552 *Public information, agency rules, opinions, orders, records, and proceedings*

(a) Each agency shall make available to the public information as follows

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;
(B) statements of the general course and method by which its functions are channelled and determined, including the nature and requirements of all formal and informal procedures available,
(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;
(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases,
(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register, and
(C) administrative staff manuals and instructions to staff that affect a member of the public,

unless the materials are promptly published and copies offered for sale To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction However, in each case the justification for the deletion shall be explained fully in writing Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(*i*) it has been indexed and either made available or published as provided by this paragraph, or
(*ii*) the party has actual and timely notice of the terms thereof

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant In such a case the court shall determine the matter *de novo* and the burden is on the agency to sustain its action In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(4) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding

(b) This section does not apply to matters that are—

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy,
(2) related solely to the internal personnel rules and practices of an agency,
(3) specifically exempted from disclosure by statute;
(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy,
(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency,
(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions, or
(9) geological and geophysical information and data, including maps, concerning wells

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress

PUBLIC LAW 93-502—1974

AN ACT

To amend section 552 of title 5, United States Code, known as the Freedom of Information Act

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) the fourth sentence of section 552(a) (2) of title 5, United States Code, is amended to read as follows. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and

required by this paragraph to be made available or published Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication

(b)(1) Section 552(a) (3) of title, 5, United States Code, is amended to read as follows:

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person

(2) Section 552(a) of title 5, United States Code, is amended by redesignating paragraph (4), and all references thereto, as paragraph (5) and by inserting immediately after paragraph (3) the following new paragraph·

(4) (A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant In such a case the court shall determine the matter *de novo*, and may examine the contents of such agency records *in camera* to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed

representative. The administrative authority shall take the corrective action that the Commission recommends

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member

(c) Section 552(a) of title 5, United States Code, is amended by adding at the end thereof the following new paragraph

(6) (A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(*i*) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination, and

(*ii*) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of sub-paragraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched No such notice shall specify a date that would result in an extension for more than ten working days As used in this sub-paragraph, 'unusual circumstances' means, but only to the extent reasonably necessary to the proper processing of the particular request ·

(*i*) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(*ii*) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request, or

(*iii*) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request

Sec. 2 (a) Section 552 (b) (1) of title 5, United States Code, is amended to read as follows.

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;.

(b) Section 552(b) (7) of title 5, United States Code, is amended to read as follows:

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.

(c) Section 552 (b) of title 5, United States Code, is amended by adding at the end the following: Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

Sec. 3. Section 552 of title 5, United States Code, is amended by adding at the end thereof the following new subsections:

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress The report shall include :

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;
(2) the number of appeals made by persons under subsection (a) (6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;
(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;
(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;
(5) a copy of every rule made by such agency regarding this section;
(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and
(7) such other information as indicates efforts to administer fully this section

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a) (4) (E), (F), and (G) Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(e) For purposes of this section, the term 'agency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

Sec. 4. The amendments made by this Act shall take effect on the ninetieth day beginning after the date of enactment of this Act.

□

Privacy Act 1974

[To safeguard personal privacy from the misuse of federal records and to provide individuals access to records concerning them, maintained by the federal agencies, the United States passed the Privacy Act in 1974. We reproduce below the text of the Act.]

An Act to amend title 5, United States Code, by adding a section 552a to safeguard individual privacy from the misuse of Federal records, to provide that individuals be granted access to records concerning them which are maintained by Federal agencies, to establish a Privacy Protection Study Commission, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the 'Privacy Act of 1974'.

Sec 2. (a) The Congress finds that :

(1) the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies;

(2) the increasing use of computers and sophisticated information technology, while essential to the efficient operations of the Government, has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use, or dissemination of personal information;

(3) the opportunities for an individual to secure employment, insurance, and credit, and his right to due process, and other legal protections are endangered by the misuse of certain information systems;

(4) the right to privacy is a personal and fundamental right protected by the Constitution of the United States; and

(5) in order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary and proper for the Congress to regulate the collection, maintenance, use, and dissemination of information by such agencies.

STATEMENT OF PURPOSE

(b) The purpose of this Act is to provide certain safeguards for an individual against an invasion of personal privacy by requiring Federal agencies, except as otherwise provided by law, to :

(1) permit an individual to determine what records pertaining to him are collected maintained, used, or disseminated by such agencies;

(2) permit an individual to prevent records pertaining to him obtained by such agencies for a particular purpose from being used or made available for another purpose without his consent;

(3) permit an individual to gain access to information pertaining to him in Federal agency records, to have a copy made of all or any portion thereof, and to correct or amend such records;

(4) collect, maintain, use, or disseminate any record of identifiable personal information in a manner that assures that such action is for a necessary and lawful purpose, that the

information is current and accurate for its intended use, and that adequate safeguards are provided to prevent misuse of such information;

(5) permit exemptions from the requirements with respect to records provided in this Act only in those cases where there is an important public policy need for such exemption as has been determined by specific statutory authority; and

(6) be subject to civil suit for any damages which occur as a result of wilful or intentional action which violates any individual's rights under this Act.

Sec. 3 Title 5, United States Code, is amended by adding after section 552 the following new section:

552a. RECORDS MAINTAINED ON INDIVIDUALS

(*a*) *Definitions* For purposes of this section :

(1) the term 'agency' means agency as defined in section 552(e) of this title;

(2) the term 'individual' means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term 'maintain' includes maintain, collect, use, or disseminate;

(4) the term 'record' means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term 'system of records' means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

(6) the term 'statistical record' means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13; and

(7) the term 'routine use' means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.

(*b*) *Conditions of Disclosure* No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be :

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a) (7) of this section and described under subsection (e) (4) (D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Administrator of General Services or his designee to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a

written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jursidction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office; or

(11) pursuant to the order of a court of competent jursidction

(c) *Accounting of Certain Disclosures.* Each agency, with respect to each system of records under its control shall :

(1) except for disclosures made under subsections (b) (1) or (b) (2) of this section, keep an accurate accounting of :

(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and

(B) the name and address of the person or agency to whom the disclosure is made;

(2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made;

(3) except for disclosures made under subsection (b) (7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at his request; and

(4) inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

(*d*) *Access to Records* Each agency that maintains a system of records shall :

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and :

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly either—

(*i*) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(*ii*) inform the individual of its refusal to amend the record in accordance with his request the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such

review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g) (1) (A) of this section;

(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(*e*) *Agency Requirements* Each agency that maintains a system of records shall :

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President,

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits and privileges under Federal programmes;

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual :

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4) (D) of this subsection, and

(D) the effects on him, if any, of not providing all or any part of the requested information;

PUBLICATION IN FEDERAL REGISTER

(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register at least annually a notice of the existence and character of the system of records, which notice shall include

(A) the name and location of the system;

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(F) the title and business address of the agency official who is responsible for the system of records;

(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

(I) the categories of sources of records in the system;

(*g*) (1) *Civil Remedies.* Whenever any agency:

(A) makes a determination under subsection (d) (3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;
(B) refuses to comply with an individual request under subsection (d) (1) of this section;
(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual, or
(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual, the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2) (A) In any suit brought under the provisions of subsection (g) (1) (A) of this section the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter *de novo*.
(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3) (A) In any suit brought under the provisions of subsection (g) (1) (B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him In such a case the court shall determine the matter *de novo* and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.
(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

DAMAGES

(4) In any suit brought under the provisions of subsection (g) (1) (C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or wilful, the United States shall be liable to the individual in an amount equal to the sum of :

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $ 1,000; and
(B) the costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date

on which the cause of action arises, except that where an agency has materially and wilfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by resason of any injury sustained as the result of a disclosure of a record prior to the effective date of this section.

(*h*) *Rights of Legal Guardians.* For the purposes of this section, the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.

(*i*) *Criminal Penalties.* (1) Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, wilfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanour and fined not more than $5,000.

(2) Any officer or employee of any agency who wilfully maintains a system of records without meeting the notice requirements of subsection (e) (4) of this section shall be guilty of a misdemeanour and fined not more than $5,000.

(3) Any person who knowingly and wilfully requests or obtains any record concerning an individual from an agency under false pretences shall be guilty of a misdemeanour and fined not more than $5,000.

(*j*) *General Exemptions* The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553 (b) (1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c) (1) and (2), (e) (4) (A) through (F), (e) (6), (7), (9), (10), and (11), and (i) if the system of records is :

(1) maintained by the Central Intelligence Agency; or

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status, (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553 (C) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(*k*) *Specific Exemptions.* The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of section 553 (b) (1), (2) and (3), (c), and (e) of this title, to exempt any system of records within the agency from subsections (c) (3), (d), (e) (1), (e) (4) (G), (H), and (I) and (f) of this section if the system of records is :

(1) subject to the provisions of section 552 (b) (1) of this title;

(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j) (2) of this section : *Provided, however,* That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal

law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18;

(4) required by statute to be maintained and used solely as statistical records;

(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process, or

(7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553 (c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(*l*) *Archival Records.* Each agency record which is accepted by the Administrator of General Services for storage, processing, and servicing in accordance with section 3103 of title 44 shall, for the purposes of this section, be considered to be maintained by the agency which deposited the record and shall be subject to the provisions of this section The Administrator of General Services shall not disclose the record except to the agency which maintains the record, or under rules established by that agency which are not inconsistent with the provisions of this section

(2) Each agency record pertaining to an identifiable individual which was transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, prior to the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall not be subject to the provisions of this section, except that a statement generally describing such records (modelled after the requirements relating to records subject to subsections (e) (4) (A) through (G) of this section shall be published in the Federal Register.

(3) Each agency record pertaining to an identifiable individual which is transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, on or after the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall be exempt from the requirements of this section except subsections (e) (4) (A) through (G) and (e) (9) of this section.

(*m*) *Government Contractors* When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authori[illegible] cause the requirements of this section to be applied to such system. [illegible] ction (i) of this section any such contractor

and any employee of such contractor, if such contract is agreed to on or after the effective date of this section, shall be considered to be an employee of an agency

(*n*) *Mailing Lists.* An individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law. This provision shall not be construed to require the withholding of names and addresses otherwise permitted to be made public.

(*o*) *Report on New Systems.* Each agency shall provide adequate advance notice to Congress and the Office of Management and Budget of any proposal to establish or alter any system of records in order to permit an evaluation of the probable or potential effect of such proposal on the privacy and other personal or property rights of individuals or the disclosure of information relating to such individuals, and its effect on the preservation of the constitutional principles of federalism and separation of powers.

(*p*) *Annual Report.* The President shall submit to the Speaker of the House and the President of the Senate, by June 30 of each calendar year, a consolidated report, separately listing for each Federal agency the number of records contained in any system of records which were exempted from the application of this section under the provisions of subsections (j) and (k) of this section during the preceding calendar year, and the reasons for the exemptions, and such other information as indicates efforts to administer fully this section.

(*q*) *Effect of Other Laws.* No agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section;

Sec. 4. The chapter analysis of chapter 5 of title 5, United States Code, is amended by inserting:

'552a Records about individuals',

immediately below:

'552 Public information; agency rules, opinions, orders and proceedings.'

Sec. 5. (a) (1) There is established a Privacy Protection Study Commission (hereinafter referred to as the 'Commission') which shall be composed of seven members as follows.

(A) three appointed by the President of the United States,
(B) two appointed by the President of the Senate, and
(C) two appointed by the Speaker of the House of Representatives

Members of the Commission shall be chosen from among persons who, by reason of their knowledge and expertise in any of the following areas—civil rights and liberties, law, social sciences, computer technology, business, records management, and State and local government—are well qualified for service on the Commission.

(2) The members of the Commission shall elect a Chairman from among themselves.

(3) Any vacancy in the membership of the Commission, as long as there are four members in office, shall not impair the power of the Commission but shall be filled in the same manner in which the original appointment was made.

(4) A quorum of the Commission shall consist of a majority of the members, except the Commission may establish a lower number as a quorum for the purpose of taking testimony. The Commission is authorized to establish such committees and delegate such authority to them as may be necessary to carry out its functions Each member of the Commission, including the Chairman, shall have equal responsibility and authority in all decisions and actions of the Commission shall have full access to all information necessary to the performance of their functions, and shall have one vote. Action of the Commission shall be determined by a majority vote of the members present. The Chairman (or a member designated by the Chairman to be acting Chairman) shall be the official spokesman of the Commission in its relations with the Congress, Government agencies, other persons, and the public, and, on behalf of the Commission, shall see to the faithful execution of the

administrative policies and decisions of the Commission, and shall report thereon to the Commission from time to time or as the Commission may direct.

(5) (A) Whenever the Commission submits any budget estimate or request to the President or the Office of Management and Budget, it shall concurrently transmit a copy of that request to Congress

(B) Whenever the Commission submits any legislative recommendations, or testimony, or comments on legislation to the President or Office of Management and Budget, it shall concurrently transmit a copy thereof to the Congress. No officer or agency of the United States shall have any authority to require the Commission to submit its legislative recommendations, or testimony, or comments on legislation, to any officer or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress

(b) The Commission shall :

(1) make a study of the data banks, automated data processing programmes, and information systems of governmental, regional, and private organizations, in order to determine the standards and procedures in force for the protection of personal information; and

(2) recommend to the President and the Congress the extent, if any, to which the requirements and principles of section 552a of title 5, United States Code, should be applied to the information practices of those organizations by legislation, administrative action, or voluntary adoption of such requirements and principles, and report on such other legislative recommendations as it may determine to be necessary to protect the privacy of individuals while meeting the legitimate needs of government and society for information

(c) (1) In the course of conducting the study required under subsection (b) (1) of this section, and in its reports thereon, the Commission may research, examine, and analyze .

(A) interstate transfer of information about individuals that is undertaken through manual files or by computer or other electronic or telecommunications means,

(B) data banks and information programmes and systems the operation of which significantly or substantially affect the enjoyment of the privacy and other personal and property rights of individuals;

(C) the use of social security numbers, licence plate numbers, universal identifiers, and other symbols to identify individuals in data banks and to gain access to, integrate, or centralize information systems and files, and

(D) the matching and analysis of statistical data, such as Federal census data, with other sources of personal data, such as automobile registries and telephone directories, in order to reconstruct individual responses to statistical questionnaires for commercial or other purposes, in a way which results in a violation of the implied or explicitly recognized confidentiality of such information.

(2) (A) The Commission may include in its examination personal information activities in the following areas· medical; insurance, education; employment and personnel; credit, banking and financial institutions; credit bureaus; the commercial reporting industry; cable television and other telecommunications media; travel, hotel and entertainment reservations; and electronic check processing.

(B) The Commission shall include in its examination a study of :

(*i*) whether a person engaged in interstate commerce who maintains a mailing list should be required to remove an individual's name and address from such list upon request of that individual;

(*ii*) whether the Internal Revenue Service should be prohibited from transfering individually identifiable data to other agencies and to agencies of State governments;

(*iii*) whether the Federal Government should be liable for general damages incurred by an individual as the result of a wilful or intentional violation of the provisions of sections 552a (g) (1) (C) or (D) of title 5, United States Code; and

(*iv*) whether and how the standards for security and confidentiality of records required under section 552a (c) (10) of such title should be applied when a record is disclosed to a person other than an agency.

RELIGIOUS ORGANIZATION EXCEPTION

(C) The Commission may study such other personal information activities necessary to carry out the congressional policy embodied in this Act, except that the Commission shall not investigate information systems maintained by religious organizations.

(3) In conducting such study, the Commission shall :

(A) determine what laws, Executive orders, regulations, directives, and judicial decisions govern the activities under study and the extent to which they are consistent with the rights of privacy, due process of law, and other guarantees in the Constitution;

(B) determine to what extent governmental and private information systems affect Federal-State relations or the principle of separation of powers;

(C) examine the standards and criteria governing programmes, policies, and practices relating to the collection, soliciting, processing, use, access, integration, dissemination, and transmission of personal information; and

(D) to the maximum extent practicable, collect and utilize findings, reports, studies, hearing transcripts, and recommendations of governmental, legislative and private bodies, institutions, organizations, and individuals which pertain to the problems under study by the Commission.

(d) In addition to its other functions the Commission may :

(1) request assistance of the heads of appropriate departments, agencies, and instrumentalities of the Federal Government, of State and local governments, and other persons in carrying out its functions under this Act;

(2) upon request, assist Federal agencies in complying with the requirements of section 552a of title 5, United States Code;

(3) determine what specific categories of information, the collection of which would violate an individual's right of privacy, should be prohibited by statute from collection by Federal agencies; and

(4) upon request, prepare model legislation for use by State and local governments in establishing procedures for handling, maintaining, and disseminating personal information at the State and local level and provide such technical assistance to State and local governments as they may require in the preparation and implementation of such legislation.

(e) (1) The Commission may, in carrying out its functions under this section, conduct such inspections, sit and act at such times and places, hold such hearings, take such testimony, require by subpoena the attendance of such witnesses and the production of such books, records, papers, correspondence, and documents, administer such oaths, have such printing and binding done, and make such expenditures as the Commission deems advisable. A subpoena shall be issued only upon an affirmative vote of a majority of all members of the Commission Subpoenas shall be issued under the signature of the Chairman or any member of the Commission designated by the Chairman and shall be served by any person designated by the Chairman or any such member. Any member of the Commission may administer oaths or affirmations to witnesses appearing before the Commission.

(2) (A) Each department, agency, and instrumentality of the executive branch of the Government is authorized to furnish to the Commission, upon request made by the Chairman, such information, data, reports and such other assistance as the Commission deems necessary to carry out its functions under this section Whenever the head of any such department, agency, or instrumentality submits a report pursuant to section 552a (o) of title 5, United States Code, a copy of such report shall be transmitted to the Commission.

(B) In carrying out its functions and exercising its powers under this section, the Commission may accept from any such department, agency, independent instrumentality, or other person any individually identifiable data if such data is necessary to carry out such powers and functions In any case in which the Commission accepts any such information, it shall assure that the information is used only for the purpose for which it is provided, and upon completion of that purpose such information shall be destroyed or returned to such department, agency, independent instrumentality, or person from which it is obtained, as appropriate.

(3) The Commission shall have the power to :

(A) appoint and fix the compensation of an executive director, and such additional staff personnel as may be necessary, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and without regard to chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, but at rates not in excess of the maximum rate for GS-18 of the General Schedule under section 5332 of such title, and

(B) procure temporary and intermittent services to the same extent as is authorized by section 3109 of title 5, United States Code.

The Commission may delegate any of its functions to such personnel of the Commission as the Commission may designate and may authorize such successive redelegations of such functions as it may deem desirable

(4) The Commission is authorized :

(A) to adopt, amend, and repeal rules and regulations governing the manner of its operations, organization and personnel;

(B) to enter into contracts or other arrangements or modifications thereof, with any government, any department, agency, or independent instrumentality of the United States, or with any person, firm, association, or corporation, and such contracts or other arrangements, or modifications thereof, may be entered into without legal consideration, without performance or other bonds, and without regard to section 3709 of the Revised Statutes, as amended (41 U S C. 5);

(C) to make advance, progress, and other payments which the Commission deems necessary under this Act without regard to the provisions of section 3648 of the Revised Statutes, as amended (31 U S C. 529); and

(D) to take such other action as may be necessary to carry out its functions under this section

(f) (1) Each [the] member of the Commission who is an officer or employee of the United States shall serve without additional compensation, but shall continue to receive the salary of his regular position when engaged in the performance of the duties vested in the Commission.

(2) A member of the Commission other than one to whom paragraph (1) applies shall receive *per diem* at the maximum daily rate for GS-18 of the General Schedule when engaged in the actual performance of the duties vested in the Commission

(3) All members of the Commission shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them in the performance of the duties vested in the Commission.

(g) The Commission shall, from time to time, and in an annual report, report to the President and the Congress on its activities in carrying out the provisions of this section. The Commission shall make a final report to the President and to the Congress on its findings pursuant to the study required to be made under subsection (b) (1) of this section not later than two years from the date on which all of the members of the Commission are appointed. The Commission shall cease to exist thirty days after the date on which its final report is submitted to the President and the Congress.

(h) (1) Any member, officer, or employee of the Commission, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section, and who knowing that disclosure of the specific material is so prohibited, wilfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanour and fined not more than $5,000.

(2) Any person who knowingly and wilfully requests or obtains any record concerning an individual from the Commission under false pretences shall be guilty of a misdemeanour and fined not more than $5,000.

Sec. 6. The Office of Management and Budget shall :

(1) develop guidelines and regulations for the use of agencies in implementing the provisions of section 552a of title 5, United States Code as added by section 3 of this Act; and

(2) provide continuing assistance to and oversight of the implementation of the provisions of such section by agencies.

Sec 7 (a) (1) It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number.

(2) the provisions of paragraph (1) of this subsection shall not apply with respect to :

(A) any disclosure which is required by Federal statute, or

(B) the disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.

(b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it

Sec. 8 The provisions of this Act shall be effective on and after the date of enactment, except that the amendments made by sections 3 and 4 shall become effective 270 days following the day on which this Act is enacted.

Sec. 9 There is authorized to be appropriated to carry out the provisions of section 5 of this Act for fiscal years 1975, 1976, and 1977 the sum of $ 1,500,000, except that not more than $ 750,000 may be expended during any such fiscal year.

Approved December 31, 1974.

□

Government in the Sunshine Act 1976

[To associate the public in the decision-making process of the federal government, the United States passed the Sunshine Act in 1976. We give below the full text of the Act].

An Act to provide that meetings of Government agencies shall be open to the public, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the 'Government in the Sunshine Act'.

DECLARATION OF POLICY

Sec. 2 It is hereby declared to be the policy of the United States that the public is entitled to the fullest practicable information regarding the decision-making processes of the Federal Government It is the purpose of this Act to provide the public with such information while protecting the rights of individuals and the ability of the Government to carry out its responsibilities

OPEN MEETINGS

Sec 3 (a) Title 5, United States Code, is amended by adding after section 552a the following new section·

552b. Open meetings

(a) For purposes of this section·

(1) the term 'agency' means any agency, as defined in section 552 (e) of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency;

(2) the term 'meeting' means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business, but does not include deliberations required or permitted by subsection (d) or (e), and

(3) the term 'member' means an individual who belongs to a collegial body heading an agency

(b) Members shall not jointly conduct or dispose of agency business other than in accordance with this section. Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation.

(c) Except in a case where the agency finds that the public interest requires otherwise, the second sentence of subsection (b) shall not apply to any portion of an agency meeting, and the requirements of subsections (d) and (e) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency properly determines that such portion or portions of its meeting or the disclosure of such information is likely to:

(1) disclose matters that are (A) specifically authorized under criteria established by an

Executive order to be kept secret in the interests of national defence or foreign policy and (B) in fact properly classified pursuant to such Executive order;

(2) relate solely to the internal personnel rules and practices of an agency;

(3) disclose matters specifically exempted from disclosure by statute (other than section 552 of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue or, (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) involve accusing any person of a crime, or formally censuring any person;

(6) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(7) disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records but only to the extent that the production of such records or information would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures or, (F) endanger the life or physical safety of law enforcement personnel;

(8) disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(9) disclose information the premature disclosure of which would—

(A) in the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to (i) lead to significant financial speculation in currencies, securities, or commodities, or (ii) significantly endanger the stability of any financial institution; or

(B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action, except that subparagraph (B) shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal; or

(10) specifically concern the agency's issuance of a subpoena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing.

(d) (1) Action under subsection (c) shall be taken only when a majority of the entire membership of the agency (as defined in subsection (a) (1) votes to take such action A separate vote of the agency members shall be taken with respect to each agency meeting a portion or portions of which are proposed to be closed to the public pursuant to subsection (c), or with respect to any information which is proposed to be withheld under subsection (c) A single vote may be taken with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, or with respect to any information concerning such series of meetings, so long as each meeting in such series involves the same particular matters and is scheduled to be held no more than thirty days after the initial meeting in such series The vote of each agency member participating in such vote shall be recorded and no proxies shall be allowed

(2) Whenever any person whose interests may be directly affected by a portion of a meeting requests that the agency close such portion to the public for any of the reasons referred to in paragraph (5), (6), or (7) of subsection (c), the agency, upon request of any one of its members, shall vote by recorded vote whether to close such meeting

(3) Within one day of any vote taken pursuant to paragraph (1) or (2), the agency shall make publicly available a written copy of such vote reflecting the vote of each member on the question If a portion of a meeting is to be closed to the public, the agency shall, within one day of the vote taken pursuant to paragraph (1) or (2) of this subsection, make publicly available a full written explanation of its action closing the portion together with a list of all persons expected to attend the meeting and their affiliation.

(4) Any agency, a majority of whose meetings may properly be closed to the public pursuant to paragraph (4) (8), (9) (A), or (10) of subsection (c), or any combination thereof, may provide by regulation for the closing of such meetings or portions thereof in the event that a majority of the members of the agency votes by recorded vote at the beginning of such meeting, or portion thereof, to close the exempt portion or portions of the meeting, and a copy of such vote, reflecting the vote of each member on the question, is made available to the public The provisions of paragraphs (1), (2), and (3) of this subsection and subsection (e) shall not apply to any portion of a meeting to which such regulations apply *Provided*, That the agency shall, except to the extent that such information is exempt from disclosure under the provisions of subsection (c), provide the public with public announcement of the time, place, and subject matter of the meeting and of each portion thereof at the earliest practicable time

(e) (1) In the case of each meeting, the agency shall make public announcement, at least one week before the meeting, of the time, place, and subject matter of the meeting, whether it is to be open or closed to the public, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting Such announcement shall be made unless a majority of the members of the agency determines by a recorded vote that agency business requires that such meeting be called at an earliest date, in which case the agency shall make public announcement of the time, place, and subject matter of such meeting, and whether open or closed to the public, at the earliest practicable time

(2) The time or place of a meeting may be changed following the public announcement required by paragraph (1) only if the agency publicly announces such change at the earliest practicable time The subject matter of a meeting, or the determination of the agency to open or close a meeting, or portion of a meeting, to the public, may be changed following the public announcement required by this subsection only if (A) a majority of the entire membership of the agency determines by a recorded vote that agency business so requires and that no earlier announcement of the change was possible, and (B) the agency publicly announces such change and the vote of each member upon such change at the earliest practicable time

(3) Immediately following each public announcement required by this subsection, notice of the time, place, and subject matter of a meeting, whether the meeting is open or closed, any change in one of the proceeding, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting, shall also be submitted for publication in the Federal Register

(f) (1) For every meeting closed pursuant to paragraphs (1) through (10) of subsection (c), the General Counsel or chief legal officer of the agency shall publicly certify that, in his or her opinion, the meeting may be closed to the public and shall state each relevant exemptive provision A copy of such certification, together with a statement from the presiding officer of the meeting setting forth the time and place of the meeting, and the persons present, shall be retained by the agency The agency shall maintain a complete transcript or electronic recording adequate to record fully the proceedings of each meeting, or portion

injunction against future violations of this section or ordering the agency to make available to the public such portion of the transcript, recording, or minutes of a meeting as is not authorized to be withheld under subsection (c) of this section.

(2) Any Federal court otherwise authorized by law to review agency action may, at the application of any person properly participating in the proceeding pursuant to other applicable law, inquire into violations by the agency of the requirements of this section and afford such relief as it deems appropriate. Nothing in this section authorizes any Federal court having jurisdiction solely on the basis of paragraph (1) to set aside, enjoin, or invalidate any agency action (other than an action to close a meeting or to withhold information under this section) taken or discussed at any agency meeting out of which the violation of this section arose

(i) The court may assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails in any action brought in accordance with the provisions of subsection (g) or (h) of this section, except that costs may be assessed against the plaintiff only where the court finds that the suit was initiated by the plaintiff primarily for frivolous or dilatory purposes. In the case of assessment of costs against an agency, the costs may be assessed by the court against the United States.

(j) Each agency subject to the requirements of this section shall annually report to Congress regarding its compliance with such requirements, including a tabulation of the total number of agency meetings open to the public, the total number of meetings closed to the public, the reasons for closing such meetings, and a description of any litigation brought against the agency under this section, including any costs assessed against the agency in such litigation (whether or not paid by the agency).

(k) Nothing herein expands or limits the present rights of any person under section 552 of this title, except that the exemptions set forth in subsection (c) of this section shall govern in the case of any request made pursuant to section 552 to copy or inspect the transcripts, recordings, or minutes described in subsection (f) of this section. The requirements of chapter 33 of title 44, United States Code, shall not apply to the transcripts, recordings, and minutes described in subsection (f) of this section.

(l) This section does not constitute authority to withhold any information from Congress, and does not authorize the losing of any agency meeting or portion thereof required by any other provision of law to be open.

(m) Nothing in this section authorizes any agency to withhold from any individual any record, including transcripts, recordings, or minutes required by this section, which is otherwise accessible to such individual under section 552a of this title.'

(b) The chapter analysis of chapter 5 of title 5, United States Code, is amended by inserting

552b Open meetings.

immediately below:

552a Records about individuals.

EX PARTE COMMUNICATIONS

Sec. 4 (a) Section 557 of title 5, United States Code, is amended by adding at the end thereof the following new subsection :

(d) (1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of *ex parte* matters as authorized by law -

(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an *ex parte* communication relevant to the merits of the proceeding;

(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

(*i*) all such written communications;
(*ii*) memoranda stating the substance of all such oral communications, and
(*iii*) all written responses and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph,

(D) upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation, and

(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge

(2) This subsection does not constitute authority to withhold information from Congress.

(b) Section 551 of title 5, United States Code, is amended :

(1) by striking out 'and' at the end of paragraph (12);

(2) by striking out the 'act' at the end of paragraph (13) and inserting in lieu thereof 'act; and', and

(3) by adding at the end thereof the following new paragraph:

(14) "*ex parte* communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

(c) Section 556 (d) of title 5, United States Code, is amended by inserting between the third and fourth sentences thereof the following new sentence: 'The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557 (d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur'.

CONFORMING AMENDMENTS

Sec. 5. (a) Section 410 (b) (1) of title 39, United States Code, is amended by inserting after 'Section 552 (public information),' the words 'section 552a (records about individuals), section 552b (open meetings) '

(b) Section 552 (b) (3) of title 5, United States Code, is amended to read as follows

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld

(c) Subsection (d) of section 10 of the Federal Advisory Committee Act is amended by striking out the first sentence and inserting in lieu thereof of the following· 'Subsections (a) (1) and (a) (3) of this section shall not apply to any portion of an advisory committee meeting where the President, or the head of the agency to which the advisory committee reports, determines that such portion of such meeting may be closed to the public in accordance with subsection (c) of section 552b of title 5, United States Code'.

EFFECTIVE DATE

Sec 6 (a) Except as provided in subsection (b) of this section, the provisions of this Act shall take effect 180 days after the date of its enactment

(b) Subsection (g) of section 552b of title 5, United States Code, as added by section 3(a) of this Act, shall take effect upon enactment.

Approved September 13, 1976

LEGISLATIVE HISTORY

House Reports No 94-880, Pt I and No 94-880, Pt 2, accompanying H R. 11656 (Comm on Government Operations) and No 94-1441 (Comm of Conference)

Senate Reports No 94-354 (Comm on Government Operations), No 94-381 (Comm on Rules and Administration) and No 94-1178 (Comm of Conference)

Congessional Record

Vol 121 (1975) Nov 5, 6, considered and passed Senate.

Vol 122 (1976) . July 28, considered and passed House, amended, in lieu of H.R 11656

Aug 31, House and Senate agreed to conference report.

Weekly Compilation of Presidential Documents

Vol 12, No 38 (1976) Sept 13, Presidential statement

□

Access to Official Information

[Privy Council President Mr. Walter Baker introduced the Federal Government's Freedom of Information Bill in the House of Commons in October 1979. The official release on the occasion gave the following outline of the Bill]

The legislation is based on the principle that government information should be available to the people of Canada, that necessary exceptions to that principle should be limited and narrowly defined and that disputes over the application of those exceptions should be resolved independently of Government

It translates those principles into law by providing access to information except for precisely defined exemptions and judicial review of Government decisions to withhold information.

Implementation of Freedom of Information Legislation will make Canada the first Federal Government with a British parliamentary system to open up Government records to the public by law

In the spirit of the new legislation, Mr Baker also released today the Cabinet discussion papers on which the Freedom of Information Bill is based Such discussion papers will be available routinely under Freedom of Information.

Under the present system, there is no obligation on Government to release any information in its possession Such information is normally withheld unless there is a positive decision to disclose it. Freedom of Information legislation will reverse that system All Government information, except that specifically defined, must be disclosed when requested

Four areas of information held by the Government are exempted from disclosure Within those areas the kinds of information to be exempted are narrowly defined.

OBLIGATIONS OF GOVERNMENT

The first area is obligations of government where the government could not carry out its responsibilities under the glare of publicity. This includes·

(*i*) information obtained under international or federal-provincial agreements for confidentiality,

(*ii*) information which could reasonably be expected to affect adversely federal-provincial negotiations,

(*iii*) information reasonably expected to be injurious to international relations, defence, and efforts aimed towards detecting, preventing or suppressing subversive or hostile activities as defined in the Act;

(*iv*) defined classes of information harmful to law enforcement responsibilities;

(*v*) information relating to the safety of individuals.

(*vi*) information which would have a substantial adverse affect on economic interests of Canada

PROTECTION OF PRIVACY

The second area is personal information Since freedom of information must be balanced

against protection of an individual's privacy, this legislation denies all access to personal information except where it relates to duties of government employees An individual's right of access to his or her own file is now controlled under Part IV of the Canadian Human Rights Act To both increase that access and further protect access by third parties, the government will soon propose amendments to that Act and remove it from the Human Rights Act.

FINANCIAL, COMMERCIAL, SCIENTIFIC AND TECHNICAL

The third area is financial, commercial, scientific and technical information which could divulge trade secrets, harm the competitive position of companies or interfere with commercial contract negotiations For the most part this includes information provided to the government by companies with the understanding it be kept confidential

OPERATIONS OF GOVERNMENT

The fourth area concerns the operations of government and is intended to protect information needed for the decision-making process of government It includes

(*i*) cabinet records other than discussion papers;
(*ii*) policy advice and recommendations from public servants;
(*iii*) government testing procedures,
(*iv*) legal opinions generated within the government,
(*v*) existing statutory restrictions on disclosing information.

Ministers may override any of the above exceptions but three information obtained under an international or federal-provincial agreement of confidentiality, personal information, or statutory restrictions

In every case when exemptable and non-exemptable information is included in the same document, the non-exemptable information will be made available when it is reasonably practicable to do so

The following is a sample list of the kind of government documents that would be released on request under freedom of information·

—Factual material of all kinds,
—Cabinet discussion papers and some records of cabinet decisions,
—Draft Bills after introduction and drafting instructions,
—Consultants' reports,
—Programme evaluations and assessments;
—Documents stating and explaining policies,
—Documents explaining decisions affecting persons,
—Test reports, environmental impact statements, product testing results;
—Technical and scientific research results and results of field research,
—Statistical surveys;
—Opinion survey results,
—Feasibility studies;
—Cost figures and estimates;
—Field reports, reports on operations, documents on the administration of Acts and of programmes;
—Minutes of discussions with industry and industry briefs;
—Internal government directives and manuals;
—Administrative guidelines and instructions;

—Ruling on interpretations;
—Organisation charts;
—Job descriptions;
—Salary ranges of officials,
—Details of contracts;
—Terms of reference for any work contracted out or for studies of departmental programmes

The legislation calls for a two-tier review procedure of government refusals to disclose information under the Act Any refusal could first be referred to an information commissioner with ombudsman-like powers to investigate the complaint and make recommendations to the department involved The information commissioner could report to Parliament any time If the government still refused to disclose the information, the applicant could appeal to the federal court for a ruling

Both the information commissioner and the court would be empowered to look at any documents involved This is made possible by repealing section 41 of the Federal Court Act which enabled a minister to prohibit production of any document claimed to be injurious to international relations, national defence, national security or to be a confidence of cabinet by affidavit.

The information commissioner and the court would determine if ministers were, in fact, proper in claiming exemptions under the Act when withholding information.

The new Act would operate in the following manner:

1 The government would provide ready access to publications explaining the kind of information that is available in the files of government institutions covered by the legislation
2 An individual or corporation could write to a government institution to request records, describing them as clearly as possible and including an application fee.
3 Departmental officials would look for and find the records, and consider whether they are exemptable under the Act The decision would be communicated to the applicant within 30 days normally. The minister would be empowered to waive exemptions in most cases
4 If unsatisfied by the response the applicant could take the case to an information commissioner for review The information commissioner would look into the case and make a recommendation to both the minister and the applicant.
5. If still unsatisfied, the applicant could take the case to the federal court for judicial review and decision

The government estimates the cost of the programme at between five and ten million dollars a year, depending on the number of requests for information under the Act

FREEDOM OF INFORMATION BILL

Purpose—(*Clause* 2)

—Government information will be broadly available to the people of Canada.
—Necessary exceptions will be limited and narrowly defined
—Disputes over the application of those exceptions will be resolved independently of the government.

ACCESS TO INFORMATION

—Government departments and agencies will provide descriptions of the kind of information in their control (Clause 5)

—Applicants requesting information apply to the appropriate department or agency. (Clause 6)
—Government institutions normally have thirty days to either provide the information or inform the applicant why it can't be provided (Clauses 7-10)
—Fees shall be paid on application, for reproducing records and for prolonged or difficult searches although they may be waived (Clause 11)

EXEMPTIONS FROM ACCESS (CLAUSES 13-25)

—Four areas of information held by the government may be exempted from disclosure Within those areas, the kinds of information to be exempted are defined Most of the exemptions can be waived by the appropriate minister

1 *Obligations of Government (Clauses* 13-18):
—Information obtained in confidence under international or federal-provincial agreements or arrangements (Clause 13)
—Information prepared for federal-provincial negotiations (Clause 14)
—Information relating to international relations and defence as defined (Clause 15)
—Law enforcement (Clause 16)
—Safety of individuals (Clause 17)
—Economic interests of Canada (Clause 18)

2 *Personal Information* (Clause 19)

3 *Financial, Commercial, Scientific and Technical Information* (Clause 20)

4 *Operations of Government* (Clauses 21-25)
—Cabinet records (Clause 21)
—Advice and recommendations from public servants (Clause 22)
—Government testing procedures (Clause 23)
—Legal opinions of government employees (Clause 24)
—Statutory restrictions on disclosure (Clause 25)

REVIEW PROCEDURE

—Government refusal to disclose information may be referred to the information commissioner for investigation (Clauses 29-31)
—The information commissioner may review complaints, see documents, recommend action and report directly to parliament (Clauses 32-39)
—Applicants may appeal government decisions to withhold information to the federal court for a decision (Clauses 40-48)

OTHER CHANGE

—Repeal of Section 41 of the Federal Court Act. (Clause 70)



Document 7—Canada

Freedom of Information Bill

[The Federal Government's Freedom of Information Bill was introduced in the House of Commons in October 1979. The following is the text of the Bill]

An Act to extend the present laws of Canada that provide access to information under the control of the Government of Canada and to amend the Canada Evidence Act, the Federal Court Act and the Statutory Instruments Act.

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enact as follows.

SHORT TITLE

1 This Act may be cited as the *Freedom of Information Act*.

PURPOSE OF ACT

2 The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in government records recognizing the principle that government information should be available to the public and recognizing that necessary exceptions to the principle should be limited and specific and that the application of those exceptions should be reviewed independently of government.

INTERPRETATION

3. In this Act,

"designated Minister", in relation to any provision of this Act, means such member of the Queen's Privy Council for Canada as is designated by the Governor in Council to act as the Minister for the purposes of that provision;

"government institution" means any department or ministry of state of the Government of Canada listed in the schedule and any board, commission, body or office listed in the schedule;

"head", in respect of a government institution, means
(*a*) in the case of a department or ministry of state listed in the schedule, the member of the Queen's Privy Council for Canada presiding over that institution, or
(*b*) in any other case, the person designated by order in council pursuant to this paragraph and for the purposes of this Act to be the head of that institution;

"Information Commissioner" means the Commissioner appointed under section 49

"record" includes any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording,

videotape, machine readable record, and any other documentary material, regardless of physical form or characteristics, and any copy thereof.

ACCESS TO GOVERNMENT RECORDS

Right of Access

4 Subject to this Act, every person who is

(*a*) a Canadian citizen,
(*b*) a permanent resident within the meaning of the *Immigration Act*, 1976, or
(*c*) a corporation incorporated by or under a law of Canada or a province

has a right to and shall, on request, be given access to any record under the control of a government institution

Information about Government Institutions

5 (1) The designated Minister shall cause to be published, on a periodic basis not less frequently than once each year, a publication containing

(*a*) a description of the organization and responsibilities of each government institution, including details on the programmes and functions of each division or branch of each government institution.
(*b*) a description of all classes of records under the control of each government institution in sufficient detail to facilitate the exercise of the right of access under this Act, and
(*c*) the title and address of the appropriate officer for each government institution to whom requests for access to records under this Act should be sent.

(2) The designated Minister shall cause the publication referred to in subsection (1) to be made available throughout Canada in conformity with the principle that every person is entitled to reasonable access thereto in order to be informed of the contents thereof

Requests for Access

6 A request for access to a record under this Act shall be made in writing to the government institution that has control of the record and shall provide sufficient detail to enable an experienced employee of the institution to identify the record

7 Where access to a record is requested under this Act, the head of the government institution to which the request is made shall, subject to sections 8, 9 and 11, within thirty days after the request is received,

(*a*) give written notice to the person who made the request as to whether or not access to the record or a part thereof will be given, and
(*b*) if access is to be given, give the person who made the request access to the record or part thereof.

8 (1) Where a government institution receives a request for access to a record under this Act that the head of the institution considers should more appropriately have been directed to another government institution that has a greater interest in the record, the head of the institution may, within fifteen days after the request is received, transfer the request to the other government institution, in which case the head of the institution transferring the request shall give written notice of the transfer to the person who made the request

(2) For the purposes of section 7, where a request is transferred under subsection (1), the request shall be deemed to have been made to the government institution to which it was

transferred on the day the government institution to which the request was originally made received it

(3) For the purposes of subsection (1), a government institution has a greater interest in a record if

(*a*) the record was originally produced in the institution; or
(*b*) in the case of a record not originally produced by a government institution, the institution was the first institution to receive the record or a copy thereof.

9. The head of a government institution may extend the time limit set out in section 7 or subsection 8(1) in respect of a request under this Act for a reasonable period of time, having regard to the circumstances, if

(*a*) the request is for a large number of records or necessitates a search through a large number of records and meeting the original time limit would unreasonably interfere with the operations of the government institution, or
(*b*) consultations are necessary to comply with the request that cannot reasonably be completed within the original time limit

by forthwith giving notice of the extension and the length of the extension to the person who made the request, which notice shall contain a statement that the person has a right to make a complaint to the Information Commissioner about the extension.

10 (1) Where the head of a government institution refuses to give access to a record or a part of a record requested under this Act, the head of the institution shall state in the notice given in respect of the record under paragraph 7(*a*)

(*a*) the specific provision of this Act on which the refusal was based or the provision on which a refusal could reasonably be expected to be based if the record existed, and
(*b*) that the person who made the request has a right to make a complaint to the Information Commissioner about the refusal.

(2) The head of a government institution is not required under subsection (1) to indicate whether a record requested under this Act exists.

(3) Where the head of a government institution fails to give access to a record or part of a record requested under this Act within the time limits set out in this Act the head of the institution shall, for the purposes of this Act, be deemed to have refused to give access to the record.

11. (1) Subject to this section, a person who makes a request for access to a record under this Act shall pay

(*a*) at the time the request is made, such application fee, not exceeding twenty-five dollars, as may be prescribed by regulation toward the costs of search for or production of the record and the costs of reviewing the record; and
(*b*) before any copies are made, a reasonable fee, determined by the head of the government institution that has control of the record, reflecting the cost of reproducing the record or part thereof.

(2) The head of a government institution to which a request for access to a record is made under this Act may, before giving access to the record, require, in addition to the fee payable under paragraph (1)(*a*), payment of an amount, calculated in the manner prescribed by regulation, for every hour in excess of five hours that is reasonably required to search for, produce or review the record

(3) Where the head of a government institution requires payment of an amount under subsection (2) in respect of a request for a record, the head of the institution may require that a reasonable proportion of that amount be paid as a deposit before the search, production or review of the record is undertaken

(4) Where the head of a government institution requires a person to pay an amount under subsection (2) or (3), the head of the institution shall

(*a*) give written notice to the person; and
(*b*) in the notice, state that the person has a right to make a complaint to the Information Commissioner about the amount required

(5) The head of a government institution to which a request for access to a record is made under this Act may, in his discretion, waive the requirement to pay a fee or other amount or a part thereof under this section or may refund a fee or other amount or a part thereof paid under this section

Form of Access

12 (1) Subject to subsection (2), a person who is given access to a record or a part thereof may, at the option of the person,

(*a*) be given a copy of the record or part thereof; or
(*b*) examine the record or part thereof

(2) No copy of a record or part thereof shall be given under this Act where

(*a*) it would not be reasonably practicable to reproduce the record or part thereof by reason of the length or nature of the record, or
(*b*) the making of such copy would involve an infringement of copyright other than copyright of Her Majesty in right to Canada.

(3) Notwithstanding any other Act, there is no obligation to give access to a record under this Act in any language other than that in which it exists but where a record exists in both official languages of Canada, as declared in the *Official Language Act*, a person who is given access shall be given access in the official language of his choice

EXEMPTIONS

Obligations of Government

13 The head of a government institution shall refuse to disclose a record requested under this Act where the record contains information that was obtained in confidence under an agreement or arrangement

(*a*) between the Government of Canada and the government of a foreign state or an international organization of states, or
(*b*) between the Government of Canada and the government of a province

14 The head of a government institution may refuse to disclose a record requested under this Act where the record contains information the disclosure of which could reasonably be expected to affect adversely federal-provincial negotiations

15 (1) The head of a government institution may refuse to disclose a record requested under this Act where the record contains information the disclosure of which could reasonably be expected to be injurious to the conduct by Canada of international relations, the

defence of Canada or any state allied or associated with Canada or the efforts of Canada toward detecting, preventing or suppressing subversive or hostile activities, including, without restricting the generality of the foregoing,

(*a*) information, assessments and plans concerning military tactics or strategy including exercises and operations aimed at preparing for hostilities or detecting, preventing or suppressing hostile or subversive activities;
(*b*) information concerning the military characteristics, capabilities or deployment of weapons or defence equipment, including any articles being designed, developed, produced or considered for use as weapons or defence equipment,
(*c*) information concerning the military characteristics, capabilities or role of any military force or any defence establishment, unit or personnel;
(*d*) intelligence obtained or prepared for
 (*i*) the defence of Canada or any state allied or associated with Canada, or
 (*ii*) the detection, prevention or suppression of subversive or hostile activities;
(*e*) intelligence respecting foreign states, international organizations of states or citizens of foreign states the release of which would interfere with the formulation of policy of the Government of Canada or the conduct by Canada of international relations;
(*f*) information on methods of collecting, assessing or handling intelligence referred to in paragraphs (*d*) and (*e*) and information on sources of such intelligence;
(*g*) information on the positions of the Government of Canada, governments of foreign states or international organizations of states the release of which would interfere with international negotiations;
(*h*) diplomatic correspondence exchanged with foreign states or international organisations of states, except correspondence the disclosure of which is consented to by the states or organizations involved, and
(*i*) information relating to the communications systems of Canada and other states used

 (*i*) for the conduct by Canada of international relations,
 (*ii*) for the defence of Canada or any state allied or associated with Canada, or
 (*iii*) in relation to the efforts of Canada toward detecting, preventing or suppressing subversive or hostile activities

(2) In this section,

(*a*) "the defence of Canada or any state allied or associated with Canada" includes the efforts of Canada toward detecting, preventing or suppressing activities of any person, group of persons or foreign state directed toward actual or potential attack or other hostile acts against Canada or any state allied or associated with Canada, and
(*b*) "subversive or hostile activities" means

 (*i*) espionage or sabotage
 (*ii*) activities of any person or group of persons directed toward the commission of terrorist acts in or against Canada or other states
 (*iii*) activities directed toward accomplishing governmental change within Canada or other states by the use of or the encouragement of the use of force, violence or any criminal means,
 (*iv*) activities directed toward gathering intelligence relating to Canada or any state allied or associated with Canada, and
 (*v*) activities directed toward threatening the safety of Canadians, employees of the Government of Canada or property of the Government of Canada.

16 The head of a government institution may refuse to disclose a record requested under this Act where the record contains

(*a*) information obtained or prepared by any government institution or part of a government institution that is an investigative body specified in the regulations in the course of investigations pertaining to
  (*i*) the detection, prevention or suppression of crime, or
  (*ii*) the enforcement of any law of Canada or a province;
(*b*) information relating to investigative techniques or plans for specific lawful investigations, or
(*c*) any other information the disclosure of which would be injurious to law enforcement, the conduct of lawful investigations or the security of penal institutions

17 The head of a government institution may refuse to disclose a record requested under this Act where the record contains information the disclosure of which could reasonably be expected to threaten the safety of an individual.

18 The head of a government institution may refuse to disclose a record requested under this Act where the record contains information the disclosure of which would have a substantial adverse effect on the economic interests of Canada including without restricting the generality of the foregoing

(*a*) information relating to the currency, coinage or legal tender of Canada,
(*b*) information concerning a contemplated change in the rate of bank interest, tariff rates, taxes or duties or concerning the sale or acquisition of land or property, or
(*c*) information relating to the regulation or supervision of financial institutions

Personal Information

19 (1) The head of a government institution shall refuse to disclose a record requested under this Act where the record contains personal information respecting an identifiable individual including, without restricting the generality of the foregoing,

(*a*) information relating to the race, national or ethnic origin, colour, religion, age or marital status of the individual,
(*b*) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;
(*c*) any identifying number, symbol or other particular assigned to the individual,
(*d*) the address, fingerprints or blood type of the individual,
(*e*) the personal opinions or views of the individual,
(*f*) correspondence sent to a government institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to such correspondence that would reveal the contents of the original correspondence, except correspondence and replies the disclosure of which are consented to by the individual,
(*g*) the views or opinions of another person in respect of the individual, and
(*h*) the name of the individual where it appears in a record together with other personal information relating to the individual or where the disclosure of the name itself would reveal information in respect of the individual

(2) Subsection (1) does not apply in respect of the following classes of information

(*a*) information in respect of an individual who is or was an officer or employee of a

(*d*) records containing briefings to Ministers of the Crown in relation to matters that are before, or are proposed to be brought before, Council or that are the subject of consultations referred to in paragraph (*c*);
(*e*) draft legislation before its introduction in Parliament; and
(*f*) records containing background explanations, analyses of problems or policy options submitted or prepared for submission by a Minister of the Crown to Council for consideration by Council in making decisions, before such decisions are made.

(2) The head of a government institution shall refuse to disclose a record requested under this Act where the record contains information about the contents of any record referred to in subsection (1) .

(3) Subsections (1) and (2) do not apply in respect of any record

(*a*) where disclosure of the record is authorized by the Prime Minister of Canada; or
(*b*) where a request is made under this Act for access to the record more than twenty years after the record came into existence.

(4) For the purposes of this section, "Council" means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet

22. (1) The head of a government institution may refuse to disclose a record requested under this Act where the record contains advice or recommendations developed by a government institution or a Minister of the Crown or an account of the process of consultation and deliberation in connection therewith, if the record came into existence less than twenty years prior to the request

(2) Subsection (1) does not apply in respect of a record or a part of a record that contains an account of, or a statement of the reasons for a decision made in the exercise of a discretionary power or in the exercise of an adjudicative function affecting the rights of a person

(3) The head of a government institution may not, pursuant to subsection (1), refuse to disclose a record under the control of the institution that contains the results of product or environmental testing unless

(*a*) the testing was done by the government institution as a service and for a fee; or
(*b*) the head of the institution believes, on reasonable grounds, that the results are misleading

23 The head of a government institution may refuse to disclose a record requested under this Act where the record contains information relating to testing or auditing procedures or techniques or details of specific tests to be given or audits to be conducted if such disclosure would prejudice the use or results of particular tests or audits

24 The head of a government institution may refuse to disclose a record requested under this Act where the record contains information that is subject to a solicitor-client privilege

Statutory Restrictions

25 The head of a government institution shall refuse to disclose a record requested under this Act where the record contains information that is required under any other Act of Parliament to be withheld from the general public or from any person not legally entitled thereto if the Act of Parliament

(*a*) provides that the requirement to withhold information be exercised in such a manner as to leave no discretion in the matter, or
(*b*) establishes particular criteria for withholding information or refers to particular types of information to be withheld.

Severability

26 Notwithstanding any other provision of this Act, where a request is made to a government institution for access to a record that the head of a the institution may refuse to disclose under this Act by reason of information contained in the record, the head of the institution shall disclose any part of the record that does not contain any such information and can reasonably be severed from any part containing such information.

General

27. The head of a government institution may refuse to disclose a record or a part of a record under the control of the institution if the head of the institution believes on reasonable grounds that the material in the record or part thereof will be published by the Government of Canada within ninety days from the time the request is made.

28. The head of a government institution may, during the first year after the coming into force of this Act, refuse to disclose a record under the control of the institution that was in existence more than five years before the coming into force of this Act where, in the opinion of the head of the institution, to comply with a request for the record would unreasonably interfere with the operations of the government institution.

COMPLAINTS

29. (1) Subject to this Act, the information Commissioner shall receive and investigate complaints

(*a*) from persons who have been refused access to a record or part of a record requested under this Act;
(*b*) from persons who have been required to pay an amount under subsection 11(2) or (3) that they consider unreasonable;
(*c*) from persons who have requested access to records in respect of which time limits have been extended pursuant to subsection 9(1) where they consider the extension unreasonable; or
(*d*) in respect of any other matter relating to requesting or obtaining access to records under this Act.

(2) Nothing in this Act precludes the Information Commissioner from receiving and investigating complaints of a nature described in subsection (1) that are submitted by a person authorized by the complainant to act on behalf of the complainant, and a reference to a complainant in any other section includes a reference to a person so authorized.

(3) Where the Information Commissioner is satisfied that there are reasonable grounds to investigate a matter relating to requesting or obtaining access to records under this Act, the Commissioner may initiate a complaint in respect thereof

30 A complaint under this Act shall be made to the Information Commissioner in writing unless the Commissioner authorizes otherwise and shall be made within one year from the time when the request for the record in respect of which the complaint is made was received.

31. (1) The Information Commissioner may refuse to investigate or may cease to investigate any complaint if, in the opinion of the Commissioner,

(*a*) the complaint is trivial, frivolous or vexatious; or
(*b*) having regard to all the circumstances, investigation or further investigation is not necessary or reasonably practicable.

(2) Where the Information Commissioner refuses to investigate or ceases to investigate

a complaint, the Commissioner shall inform the complainant of that fact with reasons therefor

INVESTIGATIONS

32 Before commencing an investigation of a complaint under this Act, the Information Commissioner shall notify the head of the government institution concerned of the intention to carry out the investigation and shall inform the head of the institution of the substance of the complaint

33 Subject to this Act, the Information Commissioner may determine the procedure to be followed in the performance of any duty or function of the Commissioner under this Act

34. (1) Every investigation by the Information Commissioner under this Act shall be conducted in private.

(2) In the course of an Investigation by the Information Commissioner under this Act, the person who made the complaint under investigation and the head of the government institution concerned shall be given an opportunity to make representations to the Commissioner, but no one is entitled as of right to be present during, to have access to or to comment on representations made to the Commissioner by any other person

35 (1) The Information Commissioner has, in relation to the carrying out of the investigation of any complaint under this Act, power

(*a*) to summon and enforce the appearance of persons before the Information Commissioner and compel them to give oral or written evidence on oath and to produce such documents and things as the Commissioner deems requisite to the full investigation and consideration of the complaint, in the same manner and to the same extent as a superior court of record;

(*b*) to administer oaths;

(*c*) to receive and accept such evidence and other information, whether on oath or by affidavit or otherwise, as the Information Commissioner sees fit, whether or not such evidence or information is or would be admissible in a court of law,

(*d*) to enter any premises occupied by any government institution on complying with any security requirements of the institution relating to the premises,

(*e*) to converse in private with any person in any premises entered pursuant to paragraph (*d*) and otherwise carry out therein such inquiries within the authority of the Information Commissioner under this Act as the Commissioner sees fit, and

(*f*) to examine or obtain copies of or extracts from books or other records found in any premises entered pursuant to paragraph (*d*) containing any matter relevant to the investigation

(2) The Information Commissioner may, during the investigation of any complaint under this Act, examine any record or other document or thing under the control of a government institution, and no information may be withheld from the Commissioner by any person on grounds of public interest or on any other grounds.

(3) Except in a prosecution of a person for an offence under section 122 of the *Criminal Code* (false statements in extra-judicial proceedings) in respect of a statement made under this Act, in a prosecution for an offence under this Act or in a review before the Federal Court—Trial Division under this Act or an appeal therefrom, evidence given by a person in proceedings under this Act and evidence of the existence of the proceedings is inadmissible against that person in a court or in any other proceedings

(4) Any person summoned to appear before the Information Commissioner pursuant to this section is entitled in the discretion of the Commissioner to receive the like fees and allowances for so doing as if summoned to attend before the Federal Court of Canada.

(5) Any document or thing produced pursuant to this section by any person or government institution shall be returned by the Information Commissioner within ten days after a request is made to the Commissioner by that person or government institution, but nothing in this subsection precludes the Commissioner from again requiring its production in accordance with this section.

36 (1) If, on investigating a complaint in respect of a record under this Act, the Information Commissioner finds that the complaint is well-founded, the Commissioner shall provide to the head of the government institution that has control of the record a report containing

(*a*) the findings of the investigation and any recommendations that the Commissioner considers appropriate; and
(*b*) where appropriate, a request that, within a time specified therein, notice be given to the Commissioner of any action taken or proposed to be taken to implement the recommendations contained in the report or reasons why no such action has been or is proposed to be taken.

(2) The Information Commissioner shall, after investigating a complaint under this Act, report to the complainant the results of the investigation, but where, pursuant to paragraph (1)(*b*), a notice has been requested of action taken or proposed to be taken in relation to the recommendation of the Commissioner arising out of the complaint, no report shall be made under this subsection until the expiration of the time within which the notice is to be given to the Commissioner.

(3) Where, pursuant to paragraph (1) (b), a notice has been requested of action taken or proposed to be taken in relation to recommendations of the Information Commissioner arising out of a complaint and no such notice is received by the Commissioner within the time specified therefor or the action described in the notice is, in the opinion of the Commissioner, inadequate or inappropriate or will not be taken in a reasonable time, the Commissioner shall so advise the complainant in his report under subsection (2) and may include in the report such comments on the matter as he thinks fit.

(4) Where, following the investigation of a complaint relating to a refusal to give access to a record requested under this Act, access is not given to the complainant, the Investigation Commissioner shall inform the complainant that the complainant has the right to apply to the Federal Court—Trial Division for a review of the matter investigated

REPORTS TO PARLIAMENT

37. The Information Commissioner shall, within three months after the 31st day of December in each year, make a report to Parliament on the activities of the office during that year

38. (1) The Information Commissioner may, at any time, make a special report to Parliament referring to and commenting on any matter within the scope of the powers, duties and functions of the Commissioner where, in the opinion of the Information Commissioner, the matter is of such urgency or importance that a report thereon should not be deferred until the time provided for transmission of the next annual report of the Commissioner under section 37.

(2) Any report made pursuant to subsection (1) that relates to an investigation under this Act shall be made only after the procedures set out in section 36 have been followed in respect of the investigation.

39 Every report to Parliament made by the Information Commissioner under section 37 or 38 shall be made by being transmitted to the Speaker of the Senate and to the Speaker of the House of Commons for tabling in those Houses,

REVIEW BY THE FEDERAL COURT

40. Any person who has been refused access to a record or part of a record requested under this Act may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Federal Court—Trial Division for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Information Commissioner are reported to the complainant under subsection 36(2) or within such further time as the Court may, either before or after the expiry of those forty-five days, fix or allow.

41 The Information Commissioner may

(*a*) apply to the Court, within the time limits prescribed in section 40, for a review of any refusal to disclose a record or part of a record requested under this Act in respect of which an investigation has been carried out by the Information Commissioner, if the Commissioner has the consent of the person who requested access to the record;
(*b*) appear before the Court on behalf of any person who has applied for a review under section 40;
(*c*) intervene in any review applied for under section 40, or
(*d*) with leave of the Court, appear as a party to any review applied for under section 40.

42. (1) An application made under section 40 or 41 shall be heard and determined in a summary way.

(2) Subject to this Act, the *Federal Court Act* and the Federal Court Rules applicable to motions before the Court apply in respect of applications made under section 40 or 41 except as varied by special rules made in respect of such applications pursuant to section 46 of the *Federal Court Act*.

43. (1) In any proceedings before the Court arising from an application under section 40 or 41, the Court shall take every reasonable precaution, including, when appropriate, receiving representations *ex parte* and conducting hearings *in camera*, to avoid the disclosure by the Court or any other person of

(*a*) any information contained in a record the disclosure of which may be refused under this Act by reason of the class of records into which it falls, or
(*b*) any information on the basis of which the disclosure of a record or part of a record may be refused under this Act.

(2) The Court may disclose to the appropriate authority information relating to an offence against any law of Canada or a province on the part of any officer or employee of a government institution, if in the opinion of the Court there is substantial evidence thereof

44 In any proceedings before the Court arising from an application under section 40 or 41, the burden of establishing that access to a record or part of a record requested under this Act may be refused shall be on the government institution concerned.

45. Where the Court determines that the head of a government institution is not entitled to refuse to disclose a record or part of a record requested under this Act, the Court shall order the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such other order as the Court deems appropriate

46 Any application under section 40 or 41 relating to a record or part of a record that the head of a government institution has refused to disclose in accordance with paragraph 13(*a*) or section 15 shall, on the request of the head of the institution, be heard and determined by three judges of the Court.

47. (1) Subject to subsection (2), the costs of and incidental to all proceedings in the

Court under this Act shall be in the discretion of the Court and shall follow the event unless the Court orders otherwise.

(2) Where the Court is of the opinion that an application for review under section 40 or 41 has raised an important new principle in relation to this Act, the Court shall order that costs be awarded to the applicant even if the applicant has not been successful in the result.

48. For the purposes of sections 41 to 47, "Court" means the Federal Court—Trial Division.

OFFICE OF THE INFORMATION COMMISSIONER

Information Commissioner

49. (1) The Governor in Council shall, by commission under the Great Seal, appoint an Information Commissioner after approval of the appointment by resolution of the Senate and House of Commons.

(2) Subject to this section, the Information Commissioner holds office during good behaviour for a term of seven years, but may be removed by the Governor in Council at any time on address of the Senate and House of Commons

(3) The Information Commissioner, on the expiration of a first or any subsequent term of office, is eligible to be re-appointed for a further term not exceeding seven years

(4) The information Commissioner ceases to hold office on attaining the age of sixty-five years.

(5) Notwithstanding subsection (4), where the Governor in Council is of the opinion that it would be in the public interest for the Information Commissioner to continue to hold office beyond the age of sixty-five years, the Governor in Council may appoint the Commissioner for one further term, not exceeding five years, commencing at the time the Commissioner attains the age of sixty-five years.

(6) In the event of the absence or incapacity of the Information Commissioner, or if the office of Information Commissioner is vacant, the Governor in Council may appoint another qualified person to hold office instead of the Commissioner for a term not exceeding six months, and that person shall, while holding such office, have all of the powers, duties and functions of the Information Commissioner under this or any other Act of Parliament and be paid such salary or other remuneration and expenses as may be fixed by the Governor in Council.

50. (1) The Information Commissioner shall rank as and have all the powers of a deputy head of a department, shall engage exclusively in the duties of the office of Information Commissioner under this or any other Act of Parliament and shall not hold any other office under Her Majesty for reward or engage in any other employment for reward.

(2) The Information Commissioner shall be paid a salary equal to the salary of the Chief justice of the Federal Court of Canada, including any additional salary authorized by section 20 of the *Judges Act*, and is entitled to be paid reasonable travel and living expenses incurred in the performance of duties under this or any other Act of Parliament.

(3) The provision of the *Public Service Superannuation Act*, other than those relating to tenure of office, apply to the Information Commissioner, except that a person appointed as Information Commissioner from outside the Public Service, as defined in the *Public Service Superannuation Act*, may, by notice in writing given to the President of the Treasury Board not more than sixty days after the date of appointment, elect to participate in the pension plan provided in the *Diplomatic Service (Special) Superannuation Act*, in which case the provisions of that Act, other than those relating to tenure of office, apply to the Information Commissioner from the date of appointment and the provisions of the *Public Service Superannuation Act* do not apply.

(4) The Information Commissioner is deemed to be employed in the public service of Canada for the purposes of the *Government Employees Compensation Act* and any regulations made under section 7 of the *Aeronautics Act*.

Staff

51. (1) Such officers and employees as are necessary to enable the Information Commissioner to perform the duties and functions of the Commissioner under this or any other Act of Parliament shall be appointed in accordance with the *Public Service Employment Act*

(2) The Information Commissioner may engage on a temporary basis the services of persons having technical or specialized knowledge of any matter relating to the work of the Commissioner to advise and assist the Commissioner in the performance of the duties and functions of the Commissioner under this or any other Act of Parliament and, with the approval of the Treasury Board, may fix and pay the remuneration and expenses of such persons.

Delegation

52. (1) Subject to subsection (2), the Information Commissioner may authorize any person to exercise or perform, subject to such restrictions or limitation as the Commissioner may specify, any of the powers, duties or functions of the Commissioner under this Act except the power to delegate under this section and the powers, duties or functions set out in sections 36, 37 and 38.

(2) The Information Commissioner may not delegate the investigation of any complaint resulting from a refusal by the head of a government institution to disclose a record or a part thereof pursuant to paragraph 13(*a*) or section 15 except to one of a maximum of two officers or employees of the Commissioner specifically designated by the Commissioner for the purpose of conducting such investigations.

General

53. The principal office of the Information Commissioner shall be in the National Capital Region described in the schedule to the *National Capital Act*.

54 For the purpose of any investigation by the Information Commissioner under this or any other Act of Parliament, any information with respect to a person or an association of persons that is obtained under or in the course of the administration of any Act of Parliament may, notwithstanding any privilege established under such Act, on the request of the Commissioner or any person acting on behalf or under the direction of the Commissioner, be communicated to the Commissioner or such other person, and the Commissioner and any person acting on behalf or under the direction of the Commissioner is entitled to inspect or have access to any statement or other writing containing any such information

55. The Information Commissioner and every person acting on behalf or under the direction of the Commissioner who receives or obtains information relating to any investigation under this or any other Act of Parliament shall, with respect to access to and the use of such information, comply with any security requirements applicable to, and take any oath of secrecy required to be taken by, persons who normally have access to and use of such information.

56 Subject to this Act, the Information Commissioner and every person acting on behalf or under the direction of the Commissioner shall not disclose any information that comes to their knowledge in the performance of their duties and functions under this Act

57 (1) The Information Commissioner may disclose or may authorize any person acting on behalf or under the direction of the Commissioner to disclose information that, in the opinion of the Commissioner, is necessary to

(*a*) carry out an investigation under this Act, or
(*b*) establish the grounds for findings and recommendations contained in any report under this Act

(2) The Information Commissioner may disclose to the appropriate authority information relating to an office against any law of Canada or a province on the part of any officer

or employee of a government institution if in the opinion of the Commissioner thereis substantial evidence thereof.

58. In carrying out an investigation under this Act and in any report made to Parliament under section 37 or 38, the Information Commissioner shall take every reasonable precaution to avoid the disclosure of, and shall not disclose,

(*a*) any information contained in a record the disclosure of which may be refused under this Act by reason of the class of record into which it falls; or
(*b*) any infomation on the basis of which a record or a part of a record may be refused under this Act.

59. The Information Commissioner or any person acting on behalf or under the direction of the Commissioner is not a competent or compellable witness, in respect of any matter coming to the knowledge of the Commissioner or that person as a result of performing any duties to founctions under this Act during an investigation, in any proceeding other than a prosecution for an offence under this Act, an offence under section 122 of the *Criminal Code* (false statements in extra-judicial proceedings) in respect of a statement made under this Act or in a review before the Federal Court—Trial Division under this Act or an appeal thereform

60 (1) No criminal or civil proceedings lie against the Information Commissioner, or against any person acting on behalf or under the direction of the Commissioner, for anything done, reported or said in good faith in the course of the exercise or performance or purported exercise or performance of any power, duty or function of the Commissioner under this Act.

(2) For the purposes of any law relating to libel or slander,

(*a*) anything said, any information supplied or any document or thing produced in good faith in the course of an investigation by or on behalf of the Information Commissioner under this Act is privileged, and
(*b*) any report made in good faith by the Information Commissioner under this Act and any fair and accurate account of the report made in good faith in a newspaper or any other periodical publication or in a broadcast is privileged

OFFENCES

61. (1) No person shall obstruct the Information Commissioner or any person acting on behalf or under the direction of the Commissioner in the performance of the Commissioner's duties and functions under this Act.

(2) Every person who contravenes this section is guilty of an offence and liable on summary conviction to a fine not exceeding one thousand dollars

GENERAL

62 This Act does not apply to

(*a*) published material or material available for purchase by the public;
(*b*) Library or museum material made or acquired and presented solely for reference or exhibition purposes, or
(*c*) material placed in the Public Archives by or on behalf of persons or organizations other than government institutions

63. The designated Minister shall

(*a*) cause to be kept under review the manner in which records under the control of government institutions are maintained and managed to ensure compliance with the provisions of this Act and the regulations relating to access to records;
(*b*) prescribe such forms as may be required for the operation of this Act and the regulations: and
(*c*) cause to be prepared and distributed to government institutions guidelines concerning the operation of this Act and the regulations

64 The head of a government institution may by order designate one or more officers or employees of that institution to exercise or perform any of the powers, duties or functions of the head of the institution under this Act specified in the order.

65. Notwithstanding any other Act of Parliament, no civil or criminal proceedings lie against the head of any government institution, or against any person acting on behalf or under the direction of the head of a government institution, and no proceedings lie against the Crown, for the disclosure in good faith of any record or any part thereof pursuant to this Act or for any consequences that flow from such disclosure.

66. (1) The administration of this Act shall be reviewed on a permanent basis by such committee of the House of Commons, of the Senate or of both Houses of Parliament as may be designated or established by Parliament for that purpose.

(2) The committee designated or established by Parliament for the purposes of subsection (1) shall, within three years after the coming into force of this Act, undertake a comprehensive review of the provisions and operation of this Act, and shall forthwith submit a report to Parliament thereon including a statement of any changes the Committee would recommend.

67 This Act is binding on Her Majesty in right of Canada

68 (1) The Governor in Council may make regulations

(*a*) prescribing a fee for the purpose of paragraph 11(1)(*a*) and the manner of calculating an amount payable for the purpose of subsection 11(2); and
(*b*) specifying investigative bodies for the purpose of paragraph 16(*a*)

(2) The Governor in Council may, by order, amend the schedule by adding thereto any department, ministry of state, board, commission, body or office of the Government of Canada.

CANADA EVIDENCE ACT

69 The *Canada Evidence Act* is amended by adding thereto, immediately after section 36 thereof, the following heading and section:

Disclosure of Government Information

36 1 (1) A Minister of the Crown or other person interested may object to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying orally or in writing to the court, person or body that the information should not be disclosed on the grounds of a specified public interest.

(2) An objection to disclosure referred to in subsection (1) may be reviewed by a superior court, in which case the court may examine or hear the information in respect of which the objection was made and order its disclosure, subject to such restrictions or conditions as it deems appropriate, if it concludes that, in the circumstances of the case, the public interest in disclosure outweighs in importance the specified public interest

(3) An objection to disclosure referred to in subsection (1) made to a court, person or body other than a superior court shall be determined in accordance with subsection (2) but may only be reviewed, on application, by

(*a*) the Federal Court—Trial Division, in the case of a person or body vested with power to compel production by or pursuant to an Act of Parliament if the person or body is not a court established under a law of a province; or
(*b*) the trial division or trial court of the superior court of the province within which the court, person or body exercises its jurisdiction, in any other case

(4) An appeal lies from a determination under subsection

(*a*) to the Federal Court of Appeal from a determination of the Federal Court—Trial Division, or
(*b*) to the court of appeal of a province from a determination of a trial division or trial court of a superior court of a province

(5) An appeal lies to the Supreme Court of Canada with leave of that Court from a determination of the Federal Court of Appeal or a court of appeal of a province under this section where the Supreme Court is of the opinion that the question involved in the case sought to be appealed is, by reason of its public importance on the importance of any issue of law or any issue of mixed law and fact involved in the question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it.

FEDERAL COURT ACT

70. Section 41 of the *Federal Court Act* is repealed.

STATUTORY INSTRUMENTS ACT

71 (1) Subparagraph 27(c)(iii) of the *Statutory Instruments Act* is repealed and the following substituted therefor:

"(*iii*) any regulation or class of regulation where the Governor in Council is satisfied that the regulation or class of regulation is such that publication could reasonably be expected to
(A) affect adversely federal provincial negotiations, or
(B) be injurious to the conduct by Canada of international relations, the defence of Canada or any state allied or associated with Canada or the efforts of Canada towards detecting, preventing or suppressing subversive or hostile activities, as defined in subsection 15(2) of the *Freedom of Information Act*;"

(2) Subparagraph 27(*d*) (*ii*) of the said Act is repealed and the following substituted therefor.

"(*ii*) any statutory instrument or class of statutory instrument other than a regulation, where the Governor in Council is satisfied that the inspection thereof and the obtaining of copies thereof could reasonably be expected to
(A) affect adversely federal-provincial negotiations, or
(B) be injurious to the conduct by Canada of international relations, the defence of Canada or any state allied
or associated with Canada or the efforts of Canada towards detecting, preventing or suppressing subversive or hostile activities, as defined in sub-section 15(2) of the *Freedom of Information Act, or*"

CONSEQUENTIAL AMENDMENTS

Canadian Human Rights Act

72. Section 44 of *Canadian Human Rights Act* is repealed and the following substituted therefor,

44 (1) Where any investigator of Tribunal requires the disclosure of any information and a Minister of the Crown or any other person interested objects to its disclosure, the Commission may apply to the Federal Court of Canada for a determination of the matter

(2) Where the Commission applies to the Federal Court of Canada pursuant to subsection (1) and the Minister of the Crown or other person interested objects to the disclosure in accordance with section 36 1 of the *Canada Evidence Act*, the matter shall be determined in accordance with the terms of that section

(3) Where the Commission applies to the Federal Court of Canada pursuant to subsection (1) but the Minister of the Crown or other person interested does not within ninety days thereafter object to the disclosure in accordance with section 36 1 of the *Canada Evidence Act*, the Court may take such action as it deems appropriate

COMMENCEMENT

73. This Act or any section or sections of this Act shall come into force on a day or days to be fixed by proclamation

EXPLANATORY NOTES

Clause 70 Section 41 of the *Federal Court Act* reads as follows

"41. (1) Subject to the provisions of any other Act and to subsection (2), when a Minister of the Crown certifies to any court by affidavit that a document belongs to a class or contains information which on grounds of a public interest specified in the affidavit should be withheld from production and discovery, the court may examine the document and order its production and discovery to the parties, subject to such restrictions or conditions as it deems appropriate, if it concludes in the circumstances of the case that the public interest in the proper administration of justice outweighs in importance the public interest specified in the affidavit

(2) When a Minister of the Crown certifies to any court by affidavit that the production or discovery of a document or its contents would be injurious to international relations, national defence or security, or to federal-provincial relations, or that it would disclose a confidence of the Queen's Privy Council for Canada, discovery and production shall be refused without any examination of the document by the court "

Clause 71. The relevant portions of section 27 of the *Statutory Instruments Act* at present read as follows

"27 The Governor in Council may make regulations

(*c*) subject to any other Act of the Parliament of Canada, exempting from the application of subsection (1) of section 11

(iii) any regulation or class of regulation where the Governor in Council is satisfied that the regulation or class of regulation is such that *in the interest of international relations, national defence or security or federal-provincial relations it should not be published*

(*d*) precluding the inspection of and the obtaining of copies of

(ii) any statutory instrument or class of statutory instrument other than a regulation, where the Governor in Council is satisfied that *in the interest of international relations, national defence or security or federal-provincial relations* the inspection thereof and the obtaining of copies thereof *should be precluded*, or"

Clause 72: Section 44 of the *Canadian Human Rights Act at* present reads as follows:

44 (1) Where any investigator or Tribunal requires production *or discovery of a document* and a Minister of the Crown objects to its *production or discovery*. The Commission may apply to the Federal Court of Canada for a determination of the matter.

(2) Where the Commission applies to the Federal Court of Canada pursuant to subsection (1) and the Minister of Crown *files an affidavit* of the kind described *in subsection 41(1)* or (2) *of the Federal Court Act*, the matter shall be determined in accordance with the terms of that section *subject to such modification as the circumstances require.*

(3) where the Commission applies to the Federal Court of Canada pursuant to subsection (1) but the Minister of the Crown does not within ninety days thereafter *file an affidavit of the kind referred to in subsection* (2), the Court may take such action as it deems appropriate.

SCHEDULE

(Section 3)

GOVERNMENT INSTITUTIONS

Departments and Ministries of State

Department of Agriculture
Department of Communications
Department of Consumer and Corporate Affairs
Ministry of State for Economic Development
Department of Employment and Immigration
Department of Energy, Mines and Resources
Department of the Environment
Department of External Affairs
Department of Finance
Department of Fisheries and Oceans
Department of Indian Affairs and Northern Development
Department of Industry, Trade and Commerce
Department of Insurance
Department of Justice
Department of Labour
Department of National Defence
Department of National Health and Welfare
Department of National Revenue
Post Office Department
Department of Public Works
Department of Regional Economic Expansion
Ministry of State for Science and Technology
Department of the Secretary of State
Department of the Solicitor General
Department of Supply and Services
Department of Transport
Department of Veterans Affairs

Other Government Institutions

Advisory Council on the Status of Women
Agricultural Products Board
Agricultural Stabilization Board
Anti-Dumping Tribunal
Atlantic Pilotage Authority

Atomic Energy Control Board
Bank of Canada
Bilingual Districts Advisory Board
Blue Water Bridge Authority
Board of Trustees of the Queen Elizabeth II Canadian Fund to Aid in Research on the Diseases of Children
Bureau of Pension Advocates
Canada Council
Canada Deposit Insurance Corporation
Canada Empolyment and Immigration Commission
Canada Labour Relations Board
Canada Mortgage and Housing Corporation
Canadian Commercial Corporation
Canadian Dairy Commission
Canadian Film Development Corporation
Canadian Forces
Canadian Government Specifications Board
Canadian Grain Commission
Canadian Human Rights Commission
Canadian Intergovernmental Conference Secretariat
Canadian International Development Agency
Canadian Livestock Feed Board
Canadian Patents and Development Limited
Canadian Penitentiary Service
Canadian Pension Commission
Canadian Radio-television and Telecommunications Commission
Canadian Saltfish Corporation
Canadian Transport Commission
The Canadian Wheat Board
Copyright Appeal Board
Crown Assets Disposal Corporation
Defence Construction (1951) Limited
The Director of Soldier Settlement
The Director, The Veterans' Land Act
Economic Council of Canada
Energy Supplies Allocation Board
Export Development Corporation
Farm Credit Corporation
Federal Business Development Bank
Federal Insolvency Trustee Agency
Federal Mortgage Exchange Corporation
Federal Provincial Relations Office
Fisheries Prices Support Board
The Fisheries Research Board of Canada
Foreign Investment Review Agency
Freshwater Fish Marketing Corporation
Great Lakes Pilotage Authority, Ltd.
Historic Sites and Monuments Board of Canada
Immigration Appeal Board
International Development Research Centre
Laurentian Pilotage Authority
Law Reform Commission of Canada
Medical Research Council

Merchant Seamen Compensation Board
Metric Commission
National Arts Centre Corporation
National Battlefields Commission
National Capital Commission
National Design Council
National Energy Board
National Farm Products Marketing Council
National Film Board
National Harbours Board
National Library
National Museums of Canada
National Parole Board
National Research Council of Canada
Natural Sciences and Engineering Research Council
Northern Canada Power Commission
Northwest Territories Water Board
Office of the Comptroller General
Office of the Co-ordinator, Status of Women
Office of the Correctional Investigator
Office of the Custodian of Enemy Property
Pacific Pilotage Authority
Pension Appeals Board
Pension Review Board
Prairie Farm Assistance Administration
Prairie Farm Rehabilitation Administration
Privy Council Office
Public Archives
Public Service Commission
Public Service Staff Relations Board
Public Works Land Company Limited
Regional Development Incentive Board
Restrictive Trade Practices Commission
Royal Canadian Mint
Royal Canadian Mounted Police
The St Lawrence Seaway Authority
Science Council of Canada
The Seaway International Bridge Corporation, Ltd.
Social Sciences and Humanities Research Council
Standards Council of Canada
Statistics Canada
Statute Revision Commission
Superintendant of Bankruptcy
Tariff Board
Tax Review Board
Textile and Clothing Board
Treasury Board Secretariat
Uranium Canada, Limited
War Veterans Allowance Board
Yukon Territory Water Board

Document 8—Australia

Access to Official Information

[Introducing the Freedom of Information Bill in the Senate, in June 1978, Senator the Hon. P D. Durack, Attorney-General, made the following statement].

Hon senators will be aware from public statements, such as the governor-general's speech at the opening of this parliament. of the Government's concern to ensure that the Australian community has access to official information where this can be done without endangering another overriding public interest The interests of all sections of the community need to be taken into account by the government when it moves to widen the opportunities for gaining access to official information We have, however, been particularly mindful that any such initiatives must take account of those individuals and groups traditionally seen as having specific claims to access to such information Broadly these are senators and members, the other levels of government in Australia, individuals, groups and organisations who seek information to allow them properly to pursue their legitimate interests—for example, those seeking to press claims to benefits, rights, or other entitlements—individuals and groups representing a particular section of society seeking legitimately to advocate their particular views with respect to matters of government policy, the media; and persons undertaking academic research Obviously these categories overlap

There are, of course, many means properly open already, both within and outside the Parliament, by which official information can be obtained Some involve compulsory processes, others are voluntary Hon senators will know that much official information is made available, for example, in answers to parliamentary questions, in ministerial policy statements, in second reading speeches, and by the tabling of papers and reports In appropriate cases Bills and reports are left to lie to promote informed public comment and debate

In the parliamentary statement of the Prime Minister (Mr Malcolm Fraser) of 9 December 1976 and the recent parliamentary statement on the setting up of legislation committees in the other place, references were made to a number of recent and proposed initiatives having a bearing on access to information such as draft guidelines on the handling of information requests by senators and members to departments and authorities, draft guidelines on appearances by public servants before party committees, and a study of the possible scope for improvement in the arrangements for provision of explanatory memoranda on Bills The statement of 9 December 1976 also contained guidelines on pre-election consultations by the opposition with officials

Existing extra-parliamentary avenues available to a member of the Australian community to obtain information are wide-ranging and include government material published and distributed through the Australian Government Publishing Service, such as the *Commonwealth Record*, as well as many types of material produced internally by departments and instrumentalities, and often distributed through the various liaison-advisory services of those departments and instrumentalities

In line with its recognition and overall concern that a member of the community may better protect his individual rights, the government has already been active in ensuring that,

when legislation was passed to establish an external review system, the citizen's opportunities for access to information were buttressed. Subject to the need, in the public interest, for confidentiality in certain circumstances, these recent measures such as the setting-up of the administrative appeals tribunal, the appointment of a Commonwealth ombudsman and, once commenced, the Administrative Decisions (Judicial Review) Act provide ways in which a member of the public can gain access to relevant official information not previously available. Taken together, these legislative initiatives provide unparalleled opportunities for the redress of perceived grievances arising from administrative actions. The Commonwealth's external review system is recognised as being one of the most advanced in the world

I now wish to inform Hon. senators of a number of recent decisions and further initiatives being taken by the government to provide additional arrangements for access to official information.

POLICY INFORMATION AND POLICY DISCUSSION PAPERS

The report of the Joint Committee on the Parliamentary Committee System recommended 'that governments adopt the practice of presenting to the House of Representatives Green Papers and White Papers relating to proposed legislation', and the Royal Commission on Australian Government Administration recommended 'that wider use be made of Green Papers to open up public debate before programs are finalised.'

The Government has decided to formalise the practice of issuing policy information—White—and Policy discussion—Green Papers in appropriate cases and to use this terminology—policy information and policy discussion—in a uniform way so that in future a policy information paper will be an information document setting out the policy. philosophy and reasoning of government decisions affecting the community and which presents policy to which the government is firmly committed; and/or offers explanation to the general community of government decisions or intentions; and/or indicates the broad lines of proposed legislation and possibly of future executive action; and/or provides the factual basis for informed parliamentary and public debate.

A policy discussion paper will be a discussion document setting out alternative courses of action and which indicates the policy options available in respect of a particular matter with a view to seeking the opinions of informed and interested parties; and/or presents tentative proposals or options for discussion but specifically and on its face does not commit the Government to adopt any of the options expressed in the paper; and/or gives the parliament an opportunity to address itself to policy matters before decisions are taken; and/or encourages public discussion while policy is still in the formative stage. Such papers will not be officially designated as policy information or policy discussion papers unless they are to be presented to the parliament

New instructions are being issued to ensure that, in the preparation of policy proposals for consideration by the government, Ministers and officials give specific consideration to what factual material and analysis embodied in documents which, because of an overriding public interest, the government would wish to retain as confidential, might be released publicly and whether or not such material might be presented suitably as a policy information or policy discussion paper. It needs to be recognised, of course, that issue of a policy discussion paper does not mean that particular action, such as issue of a policy information paper, will necessarily follow.

Considerable effort and resources are involved in government information activities. In harmony with its twin desires for improved public access to information and greater efficiency and effectiveness in administration, the government has been giving some thought to current arrangements.

In this regard, Hon senators will be aware that the Royal Commission on Australian Government Administration made several recommendations relating to public access to

government information. In particular, it recommended that there be a review of departmental information programs. The government accepted this recommendation and each minister was asked to review the ways in which his or her department disseminates information to the public on government programs and activities.

Following a preliminary examination of these matters, the government has decided to establish a small inter-departmental task force to make recommendations to ministers on the effectiveness of particular departmental information activities, including: information for disadvantaged groups; an examination of the most effective uses of printed material and the non-print media; methods of distribution; the role, operation and staffing of departmental information units; evaluation procedures in departments; means of recording information expenditure; and scope for cost recovery.

The government has also decided to establish a small information unit to encourage more effective communication to the public of government decisions and actions. This unit will have a similar role to that defined for the government public relations office established in 1951 by the Menzies Government and which operated until 1973. These efforts will, the government expects contribute to a continued improvement in access by the public to information on government activities.

The Review of Post-Arrival Programmes and Services to Migrants has shown that ethnic groups have particular problems in obtaining access to information As the Prime Minister announced on 30 May, the government will implement the Review's recommendations including those relating to new and additional special information services for migrants In this respect the government will move to strengthen coordination of information services and advice to ethnic groups There will be an extensive survey of migrants' need for information and its dissemination Further, in accordance with the recommendations of the Review, steps will be taken to improve the ways in which migrants get information in areas of special need, including information relevant to employment, health, consumer protection, bail procedures, the Commonwealth ombudsman and legal aid

DEPARTMENTAL AND INSTRUMENTALITY ANNUAL REPORTS

Hon senators will be aware that, unlike many Commonwealth instrumentalities, departments of state are not statutorily required to make annual reports for tabling in the parliament Nevertheless, some departments have done so. The Royal Commission on Australian Government Administration made several recommendations on this subject. The government has considered those recommendations and, in the interests of wider dissemination of information on the activities of government, has agreed that all departments produce annual reports.

The detailed content of each annual report will be the responsibility of the permanent head concerned. An interdepartmental working party is being established to prepare broad guidelines on the desirable content of such reports, and to undertake a review of the range of financial information suggested by the Royal Commission. The working party will take into account the findings of the report of the joint committee on publications—August 1977 —following its inquiry into the purpose, scope and distribution of the parliamentary papers series, and the implications of proposed freedom of information legislation

I should mention that the government has been concerned that there have, over many years, been delays in the tabling of some reports required by statute It is obviously most desirable that these reports be available as quickly as possible after the end of the year to which they refer, not the least because of their assistance in providing information to Hon. senators The Prime Minister has therefore recently written to all ministers specifically drawing this problem to their attention, with a view to ensuring that reports are presented to the parliament in proper time.

A related aspect of the government's administrative programme to facilitate the provision of information to its clients, the public, was its decision to establish the

Interdepartmental Committee on Improvement in the Quality of Services provided to the General Public by counter staff in Commonwealth departments. That Committee, which considered the views of the Royal Commission on Australian Government Administration, investigated ways and means of improving the government's counter services and put recommendations to the government.

The government has reaffirmed its desire to upgrade the standard of counter staff facilities and improve counter staff services Whilst the government has endorsed a number of the committee's recommendations and directed that departments and agencies implement them, it has also requested that additional studies be undertaken on some recommendations prior to further consideration by the government. The government will be making material, including the committee's report available publicly once it has concluded its examination of the report's recommendations. One particular initiative, however, should be mentioned in this statement. The government has commissioned preparation of a simple directory of the more common services provided by Commonwealth bodies, for use at counters.

In addition to general access to material through normal governmental and departmental operations, information relevant to development of Commonwealth policies and programmes is also made available to other levels of government in Australia, and to a considerable range of representatives from the community, through advisory-consultative bodies which the Commonwealth has established or in which the Commonwealth participates

The establishment by this government of the Advisory Council for Inter-Government Relations, and agreement at the October 1977 Premiers Conference on new, broader consultative processes between the Commonwealth and the states on treaty matters and the use of the external affairs power, have proved noteworthy additions to the inter-governmental consultative processes Such recently established bodies as the National Consultative Council on Social Welfare, the National Women's Advisory Council, the Australian Ethnic Affairs Council, the National Aboriginal Conference and the National Labour Consultative Council are examples of the Government's desire to bring a wide range of interest groups in the community into the policy advising processes of government.

I now turn to significant legislative initiatives about to be taken by the government.

FREEDOM OF INFORMATION BILL

I shall be introducing later today the Freedom of Information Bill 1978 which is a unique legislative measure in a government system with a traditional Westminster type of responsible executive The provisions of the Bill are based largely on the recommendations of the Interdepartmental Committee Report on Policy Proposals for Freedom of Information Legislation which was tabled in the parliament on 9 December 1976.

Broadly stated. the Bill will give members of the public enforceable rights to access, subject to specified exceptions, to future documents in the possession of departments—other than the parliamentary departments—and of statutory authorities and other Commonwealth agencies, and to official documents in the possession of ministers The person seeking the document will not be required to 'prove an interest' in that document and the procedures to gain properly authorized access will be kept as simple as possible Access may be refused to documents where disclosure would be contrary to the public interest on one or more of the grounds set out in the Bill Except in specified circumstances the decision whether a document qualifies for exemption will be reviewable by the Administrative Appeals Tribunal.

The Bill would not prevent ministers and officials from providing access to documents, even though they qualify the exemption, where such access can properly be granted It also requires in specified circumstances that access be granted to documents with exempt material exercised In addition the Bill will require the publication or making available of information concerning the functions of departments, authorities and agencies, and of various materials such as procedural manuals, often referred to as 'hidden law' which may affect persons in their dealings with a government agency.

ARCHIVES BILL

I shall also be introducing later today the Archives Bill 1978, which replaces current administrative processes. It will statutorily establish the Australian archives and provide for the preservation of government records of continuing value and of related material of national significance, and access by scholars and the public to the archival resources of the Commonwealth in accordance with the government's access policy. Detailed descriptions of records and other archival materials—including those in the custody of other institutions—will be recorded in the Australian national register of records.

The legislation will provide that the generality of government records more than 30 years old are to be made available for public access. Records to which the public is entitled to have access under the legislation will be recorded in an Australian national guide to archival material which will also include details of records hitherto made available under existing administrative arrangements and other archival materials of general public interest The guide will be available for public inspection and, as an interim measure, while the guide is being compiled, the reference services of the Archives will be available to assist in identifying material to which the public is entitled to have access.

In accordance with general arrangements to be approved by the Prime Minister, the minister responsible for the archives will be empowered, in consultation with the responsible government agency, to make whole classes of records which are less than 30 years old, available for public access, and to allow access, by persons for specified purposes, to records not otherwise available.

Mr President, excessive secrecy would be unwholesome and inimical to the democratic process. Unfettered access to all official documents would make government impossible. The aim of the government initiatives I have announced is to balance the acknowledged interest of the public in obtaining increased access to official information against other public interests which require that certain information should remain confidential Such a task is never completed and among other things costs need to be monitored. But the evolutionary process towards a more open governmental system is continuing as evidenced by the advances now announced

□

The Freedom of Information Bill

[Australia introduced the Freedom of Information Bill in the Senate in June 1978. The Bill is pending consideration by the Senate. Following is the text of the Bill.]

A Bill for an Act

To give to members of the public rights of access to official documents of the Government of the Commonwealth and of its agencies.

Be it enacted by the Queen, and the Senate and House of Representatives of the Commonwealth of Australia, as follows:

PART I—PRELIMINARY

Short Title

1. This Act may be cited as the *Freedom of Information Act* 1978.

Commencement

2 The several parts of this Act shall come into operation on such respective dates as are fixed by Proclamation.

Interpretation

3 (1) In this Act, unless the contrary intention appears :

'agency' means a Department or a prescribed authority,

'applicant' means a person who has made a request,

'Department' means a Department of the Australian Public Service other than the Department of the Senate, the Department of the House of Representatives, the Department of the Parliamentary Library, the Department of the Parliamentary Reporting Staff and the Joint House Department;

'document' includes any written or printed matter, any map, plan or photograph, and any article or thing that has been so treated in relation to any sounds or visual images that those sounds or visual images are capable, with or without the aid of some other device, of being reproduced from the article or thing, and includes a copy of any such matter, map, plan, photograph, article or thing, but does not include library material maintained for reference purposes,

'document of an agency' or 'document of the agency' means a document in the possession of an agency, or in the possession of the agency concerned, as the case requires, whether created in the agency or received in the agency;

'enactment' means·

(*a*) an Act;

(*b*) an Ordinance of the Australian Capital Territorry, or

(*c*) an instrument (including rules, regulations or by-laws) made under an Act or under such an Ordinance;

'exempt document' means·

(*a*) a document which, by virtue of a provision of Part IV, is an exempt document;

(*b*) a document in respect of which, by virtue of regulations made in accordance with section 5, an agency is exempt from the operation of this Act; or

(*c*) an official document of a Minister that contains some matter that does not relate to the affairs of an agency or of a Department of State;

'exempt matter' means matter the inclusion of which in a document causes the document to be an exempt document,

'officer', in relation to an agency, includes a member of the agency or a member of the staff of the agency;

'official document of a Minister' or 'official document of the Minister' means a document in the possession of a Minister, or in the possession of the Minister concerned, as the case requires, that relates to the affairs of an agency or of a Department of State and, for the purposes of this definition, a Minister shall be deemed to be in possession of a document that has passed from his possession if he is entitled to access to the document and the document is not a document of an agency;

'Ombudsman' means the Commonwealth Ombudsman;

'Ordinance', in relation to the Australian Capital Territory or the Northern Territory, includes a law of a State that applies, or the provisions of a law of a State that apply, in the Territory by virtue of an enactment;

'prescribed authority' means:

(*a*) a body corporate, or an unincorporated body, established for a public purpose by, or in accordance with the provisions of, an enactment, other than .

(*i*) an incorporated company or association;
(*ii*) a body that, under sub-section (2), is not to be taken to be a prescribed authority for the purposes of this Act;
(*iii*) the Australian Capital Territory Legislative Assembly;
(*iv*) the Legislative Assembly of the Northern Territory or the Executive Council of the Northern Territory; or
(*v*) a Royal Commission;

(*b*) any other body, whether incorporated or unincorporated, declared by the regulations to be a prescribed authority for the purposes of this Act, being .

(*i*) a body established by the Governor-General or by a Minister; or
(*ii*) an incorporated company or association over which the Commonwealth is in a position to exercise control,

(*c*) subject to sub-section (3), the person holding, or performing the duties of, an office established by an enactment; or

(*d*) the person holding, or performing the duties of, an appointment declared by the regulations to be an appointment the holder of which is a prescribed authority for the purpose of this Act, being an appointment made by the Governor-General, or by a Minister, otherwise than under an enactment,

'principal officer' means :

(*a*) in relation to a Department—the person holding, or performing the duties of, the office of Permanent Head of the Department; and

(*b*) in relation to a prescribed authority :

(*i*) if the regulations declare an office to be the principal office in respect of the authority —the person holding, or performing the duties of, that office; or
(*ii*) in any other case—the person who constitutes that authority or, if the authority is constituted by 2 or more persons, the person who is entitled to preside at any meeting of the authority at which he is present;

'request' means a request made in accordance with sub-section 13 (1);
'responsible Minister' means:

(*a*) in relation to a Department—the Minister administering the relevant Department of State;
(*b*) in relation to a prescribed authority referred to in paragraph (a) of the definition of 'prescribed authority'—the Minister administering the enactment by which, or in accord ance with the provisions of which, the prescribed authority is established;
(*c*) in relation to a prescribed authority referred to in paragraph (*c*) of that definition —the Minister administering the enactment by which the office is established; or
(*d*) in relation to any other prescribed authority—the Minister declared by the regulations to be the responsible Minister in respect of that authority,
or another Minister acting for and on behalf of that Minister;
'Tribunal' means the Administrative Appeals Tribunal
(2) An unincorporated body, being a board, council, committee, sub-committee or other body established by, or in accordance with the provisions of, an enactment for the purpose of assisting, or performing functions connected with, a prescribed authority shall not be taken to be a prescribed authority for the purposes of this Act, but shall be deemed to be comprised within that prescribed authority.
(3) A person shall not be taken to be a prescribed authority :
(*a*) by virtue of his holding an office of member of the Australian Capital Territory Legislative Assembly, member of the Legislative Assembly of the Northern Territory or Administrator or Minister of the Northern Territory; or
(*b*) by virtue of his holding, or performing the duties of :

(*i*) a prescribed office;
(*ii*) an office the duties of which he performs as duties of his employment as an officer of a Department or as an officer of or under a prescribed authority;
(*iii*) an office of member of a body; or
(*iv*) an office established by an enactment for the purposes of a prescribed authority.

(4) For the purposes of this Act, the Defence Force shall be deemed to be comprised in the Department of Defence.
(5) For the purposes of this Act, the Commonwealth Police Force and the Police Force of the Australian Capital Territory shall each be deemed to be a prescribed authority.

Act Not to Apply to Courts and Certain Tribunals
4. For the purposes of this Act :
(*a*) a court, or the holder of a judicial office or other office pertaining to a court in his capacity as the holder of that office, is not to be taken to be a prescribed authority or to be included in a Department;
(*b*) a registry or other office of a court, and the staff of such a registry or other office in their capacity as members of that staff, shall not be taken to be part of a Department;
(*c*) a tribunal, authority or body specified in this paragraph, or the holder of an office pertaining to such a tribunal, authority or body in his capacity as the holder of that office, is not to be taken to be a prescribed authority or to be included in a Department, namely :

(*i*) the Australian Conciliation and Arbitration Commission;
(*ii*) the Industrial Registrar or a Deputy Industrial Registrar;
(*iii*) the Flight Crew Officers Industrial Tribunal;
(*iv*) the Public Service Arbitrator or a Deputy Public Service Arbitrator; and
(*v*) the Coal Industry Tribunal or any other Tribunal, authority or body appointed in accordance with Part V of the *Coal Industry Act* 1946, and

(*d*) a registry or other office of, or under the charge of, a tribunal, authority or body referred to in paragraph (*c*), and the staff of such a registry or other office in their capacity as members of that staff, shall not be taken to be part of a Department

Exemption of Bodies by Regulations

5. The regulations may provide that :

(*a*) a specified body is to be deemed not to be a prescribed authority for the purposes of this Act;

(*b*) a body specified in accordance with paragraph (*a*) is, or is not, to be taken to be included in a specified agency, or

(*c*) a specified agency is to be exempt from the operation of this Act in respect of documents relating to specified functions or activities of the agency or in respect of documents of any other prescribed description.

PART II—PUBLICATION OF CERTAIN DOCUMENTS AND INFORMATION

Publication of Information Concerning Functions and Documents of Agencies

6. (1) The responsible Minister of an agency shall :

(*a*) cause to be published, as soon as practicable after the commencement of this Part but not later than 12 months after that commencement, in a form approved by the Minister administering this Act :

(*i*) a statement setting out particulars of the organization and functions of the agency, indicating, as far as practicable, the decision-making powers and other powers affecting members of the public that are involved in those functions and particulars of any arrangement that exists for consultation with, or representations by, bodies and persons outside the Commonwealth administration in relation to the formulation of policy in, or the administration of, the agency; and

(*ii*) a statement of the categories of documents that are maintained in the possession of the agency: and

(*b*) within 12 months after the publication, in respect of the agency, of the statement under sub-paragraph (*i*) or (*ii*) of paragraph (*a*) that is the first statement published under that sub-paragraph, and thereafter at intervals of not more than 12 months, cause to be published statements bringing up to date the information contained in the previous statement or statements published under that sub-paragraph.

(2) A form approved by the Minister under sub-section (1) shall be such as he considers appropriate for the purpose of assisting members of the public to exercise effectively their rights under Part III

(3) The information to be published in accordance with this section may be published by including it in the publication known as the Commonwealth Government Directory

(4) Nothing in this section requires the publication of information that is of such a nature that its inclusion in a document of an agency would cause that document to be an exempt document.

(5) Sub-section (1) applies in relation to an agency that comes into existence after the commencement of this Part as if the references in that sub-section to the commencement of this Part were references to the day on which the agency comes into existence.

Certain Documents to be Available for Inspection and Purchase

7. (1) This section applies, in respect of an agency, to documents that are provided by the agency for the use of, or are used by, the agency or its officers in making decisions or recommendations, under or for the purposes of an enactment or scheme administered by the

agency, with respect to rights, privileges or benefits, or to obligations, penalties or other detriments, to or for which persons are or may be entitled or subject, being:

(*a*) manuals or other documents containing interpretations, rules, guidelines, practices or precedents, or

(*b*) documents containing particulars of such a scheme, not being particulars contained in an enactment as published apart from this Act,

but not including documents that are available to the public as published otherwise than by an agency or as published by another agency.

(2) The principal officer of an agency shall :

(*a*) cause copies of all documents to which this section applies in respect of the agency that are in use from time to time to be made available for inspection and for purchase by members of the public;

(*b*) not later than 12 months after the commencement of this Part, cause to be published in the *Gazette* statement (which may take the form of an index) specifying the documents of which copies are, at the time of preparation of the statement, so available and the place or places where copies may be inspected and may be purchased, and

(*c*) within 12 months after the publication of the statement under paragraph (*b*) and thereafter at intervals of not more than 12 months, cause to be published in the *Gazette* statements bringing up to date the information contained in the previous statement or statements.

(3) The principal officer is not required to comply fully with paragraph (2) (*a*) before the expiration of 12 months after the date of commencement of this Part, but shall, before that time, comply with that paragraph so far as is practicable.

(4) This section does not require a document of the kind referred to in sub-section (1) containing exempt matter to be made available in accordance with sub-section (2), but, if such a document is not so made available, the principal officer of the agency shall, if practicable, cause to be prepared a corresponding document, altered only to the extent necessary to exclude the exempt matter, and cause the document so prepared to be dealt with in accordance with sub-section (2).

(5) Sub-sections (2) and (3) apply in relation to an agency that comes into existence after the commencement of this Part as if the references in those sub-sections to the commencement of this Part were references to the day on which the agency comes into existence.

(6) In this section, 'enactment' includes an Ordinance of the Northern Territory or an instrument (including rules, regulations or by-laws) made under such an Ordinance.

Unpublished Documents not to be Published

8 If a document required to be made available in accordance with section 7, being a document containing a rule, guideline or practice relating to a function of an agency, was not made available, and included in a statement in the *Gazette*, as referred to in that section, before the time (being more than 12 months after the date of commencement of this Part or the day on which the agency came into existence, whichever is the later) at which a person did, or omitted to do, any act or thing relevant to the performance of that function in relation to him (whether or not the time allowed for publication of a statement in respect of the document had expired before that time), that person, if he was not aware of that rule, guideline or practice at that time, shall not be subjected to any prejudice by reason only of the application of that rule, guideline or practice in relation to the thing done or omitted to be done by him if he could lawfully have avoided that prejudice had he been aware of that rule, guideline or practice.

PART III—ACCESS TO DOCUMENTS

Right of Access

9. Subject to this Act, every person has a legally enforceable right to obtain access in

accordance with this Act to :

(*a*) a document of an agency, other than an exempt document; or

(*b*) an official document of a Minister, other than an exempt document.

Part not to Apply to Certain Documents

10 (1) A person is not entitled to obtain accept under this Part to :

(*a*) a document, or a copy of a document, where a period of 30 years has elapsed since the end of the year ending on 31 December in which the document came into existence,

(*b*) a document that is open to public access, as part of a public register or otherwise, in accordance with another enactment, where that access is subject to a fee or other charge; or

(*c*) a document that is available for purchase by the public in accordance with arrangements made by an agency.

(2) A person is not entitled to obtain access under this Part to a document that became a document of an agency or an official document of a Minister before the date of commencement of this Part, except where access to the document by him is reasonably necessary to enable a proper understanding of a document of an agency or an official document of a Minister he has lawfully had access.

Documents in Certain Institutions

11. (1) A document shall not be deemed to be a document of an agency for the purposes of this Act by reason of its being :

(*a*) in the collection of war relics of the Commonwealth within the meaning of the *Australian War Memorial Act* 1962:

(*b*) in the collection of library material maintained by the National Library of Australia; or

(*c*) in the custody of the Australian Archives (otherwise than as a document relating to the administration of the Australian Archives),

if the document was placed in that collection, or in that custody, by or on behalf of a person (including a Minister or former Minister) other than an agency.

(2) For the purposes of this Act, a document that has been placed in the custody of the Australian Archives, or in a collection referred to in sub-section (1), by an agency shall be deemed to be in the possession of that agency or, if that agency no longer exists, the agency to the functions of which the document is most closely related.

(3) Notwithstanding sub-sections (1) and (2), records of a Royal Commission that are in the custody of the Australian Archives shall, for the purposes of this Act, be deemed to be documents of an agency and to be in the possession of the Department administered by the Minister administering the *Royal Commissions Act* 1902.

(4) Nothing in this Act affects the provision of access to documents by the Australian Archives in accordance with the *Archives Act* 1978

Access to Documents Apart from Act

12. Nothing in this Act is intended to prevent or discourage Ministers and agencies from publishing or giving access to documents (including exempt documents), otherwise than as required by this Act, where they can properly do so or are required by law to do so.

Requests for Access

13 (1) A person who wishes to obtain access to a document of an agency or an official document of a Minister may make a request in writing to the agency or Minister for access to the document

(2) Subject to sub-section (3), a request shall provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency, or the Minister, as the case may be, to identify the document

(3) Where a request is expressed to relate to all documents, or to all documents of a specified class, that contain information of a specified kind or relate to a specified subject-matter, compliance with the request may be refused if it would interfere unreasonably with the operations of the agency or the performance by the Minister of his functions, as the case may be, having regard to any difficulty that would exist in identifying, locating or collating documents containing relevant information within the filing system of the agency or of the office of the Minister.

(4) It is the duty of an agency, where practicable, to assist a person who wishes to make a request, or has made a request that does not comply with this section or has not been directed to the appropriate agency or Minister, to make a request in a manner that complies with this section or to direct a request to the appropriate agency or Minister.

(5) Where a request in writing is made to an agency for access to a document, the agency shall not refuse to comply with the request on the ground :

(*a*) that the request does not comply with sub-section (2); or

(*b*) that, in the case of a request of the kind referred to in sub-section (3), compliance with the request would interfere unreasonably with the operations of the agency, without first giving the applicant a reasonable opportunity of consultation with the agency with a view to the making of a request in a form that would remove the ground for refusal.

Transfer of Requests

14. (1) Where :

(*a*) a request is made to an agency for access to a document; and

(*b*) the document is not in the possession of that agency but is in the possession of another agency or the subject-matter of the document is more closely connected with the functions of another agency than with those of the agency to which the request is made,

the agency to which the request is made may transfer the request to the other agency and inform the person making the request accordingly and, if it is necessary to do so in order to enable the other agency to deal with the request, send the document to the other agency.

(2) Where a request is transferred to an agency in accordance with this section, it shall be deemed to be a request made to that agency and received at the time at which it was originally received.

(3) In this section 'agency' includes a Minister.

Requests Involving Use of Computers, & c.

15. (1) Where :

(*a*) a request (including a request of the kind described in sub-section 13(3)) is duly made to an agency;

(*b*) it appears from the request that the desire of the applicant is for information that is not available in discrete form in documents of the agency; and

(*c*) the agency could produce a written document containing the information in discrete form by :

(*i*) the use of a computer or other equipment that is ordinarily available to the agency for retrieving or collating stored information; or

(*ii*) the making of a transcript from a sound recording held in the agency,

the agency shall deal with the request as if it were a request for access to a written document so produced and containing that information and, for that purpose, this Act applies as if the agency had such a document in its possession.

(2) An agency is not required to comply with sub-section (1) if compliance would interfere unreasonably with the operations of the agency

Access to Documents to be Given on Request

16. (1) Subject to this Act, where :

(*a*) a request is duly made by a person to an agency or Minister for access to a document of the agency or an official document of the Minister, and

(*b*) any charge that, under the regulations, is required to be paid before access is granted has been paid,

the person shall be given access to the document in accordance with this Act.

(2) An agency or Minister is not required by this Act to give access to a document at a time when the document is an exempt document.

Time within which Formal Requests to be Decided

17 If a request to an agency or Minister :

(*a*) is made in writing and is expressed to be made in pursuance of this Act; and

(*b*) is sent by post to the agency or Minister, or delivered to an officer of the agency or a member of the staff of the Minister, at an address of the agency or of the Minister, as the case may be, that is, under the regulations, an address to which requests made in pursuance of this Act may be sent or delivered in accordance with this section,

the agency or Minister shall take all reasonable steps to enable the applicant to be notified of a decision on the request as soon as practicable but in any case not later than 60 days after the day on which the request is received by or on behalf of the agency or Minister.

Forms of Access

18 (1) Access to a document may be given to a person in one or more of the following forms.

(*a*) a reasonable opportunity to inspect the document;

(*b*) provision by the agency or Minister of a copy of the document;

(*c*) in the case of a document that is an article or thing from which sounds or visual images are capable of being reproduced, the making of arrangements for the person to hear or view those sounds or visual images,

(*d*) in the case of a document by which words are recorded in a manner in which they are capable of being reproduced in the form of sound or in which words are contained in the form of shorthand writing or in codified form, provision by the agency or Minister of a written transcript of the words recorded or contained in the document.

(2) Subject to sub-section (3) and to section 20, where the applicant has requested access in a particular form, access shall be given in that form.

(3) If the form of access requested by the applicant :

(*a*) would interfere unreasonably with the operations of the agency, or the performance by the Minister of his functions, as the case may be;

(*b*) would be detrimental to the preservation of the document or, having regard to the physical nature of the document, would not be appropriate; or

(*c*) would involve an infringement of copyright (other than copyright owned by the Commonwealth) subsisting in the document,

access in that form may be refused and access given in another form.

Deferment of Access

19. (1) An agency which, or a Minister who, receives a request may defer the provision of access to the document concerned until the happening of a particular event (including the taking of some action required by law or some administrative action), or until the expiration of a specified time, where it is reasonable to do so in the public interest or having regard to normal and proper administrative practices.

(2) Where the provision of access to a document is deferred in accordance with sub-section (1), the agency or Minister shall, in informing the applicant of the reasons for the decision, indicate, as far as practicable, the period for which the deferment will operate

Deletion of Exempt Matter

20 (1) Where :

(*a*) a decision is made not to grant a request for access to a document on the ground that it is an exempt document;

(*b*) it is practicable for the agency or Minister to grant access to a copy of the document with such deletions as to make the copy not an exempt document; and

(*c*) it appears from the request, or the applicant subsequently indicates, that the applicant would wish to have access to such a copy,

the agency or Minister shall grant access to such a copy of the document.

(2) Where access is granted to a copy of a document in accordance with sub-section (1):

(*a*) the applicant shall be informed that it is such a copy and also informed of the provision of this Act by virtue of which any matter deleted is exempt matter, and

(*b*) section 22 does not apply to the decision that the applicant is not entitled to access to the whole of the document unless the applicant requests the agency or Minister to furnish to him a notice in writing in accordance with that section.

Decisions to be made by Authorized Persons

21. A decision in respect of a request made to an agency may be made, on behalf of the agency, by the responsible Minister or the principal officer of the agency or, subject to the regulations, by an officer of the agency acting within the scope of authority exercisable by him in accordance with arrangements approved by the responsible Minister or the principal officer of the agency.

Reasons and other Particulars of Decisions to be given

22. (1) Where, in relation to a request for access to a document or an agency or an official document or a Minister, a decision is made under this Part that the applicant is not entitled to access to the document in accordance with the request or that provision of access to the document be deferred, the agency or Minister shall cause the applicant to be given notice in writing of the decision, and the notice shall :

(*a*) state the findings on any material questions of fact, referring to the material on which those findings were based, and the reasons for the decision;

(*b*) where the decision relates to a document of an agency; state the name and designation of the person giving the decision; and

(*c*) inform the applicant of his right to apply for a review of the decision

(2) An agency or Minister is not required to include in a notice under sub-section (1) any matter that is of such a nature that its inclusion in a document of an agency would cause that document to be an exempt document.

PART IV—EXEMPT DOCUMENTS

Documents Affecting National Security Defence, International Relations and Relations with States

23. (1) A document is an exempt document if disclosure of the document under this Act would be contrary to the public interest for the reason that the disclosure :

(*a*) would prejudice :

(*i*) the security of the Commonwealth;

(*ii*) the defence of the Commonwealth;

(*iii*) the international relations of the Commonwealth; or

(*iv*) relations between the Commonwealth and any State; or

(*b*) would divulge any information or matter communicated in confidence by or on behalf of the Government of another country or of a State to the Government of the Commonwealth or a person receiving the communication on behalf of that Government.

(2) Where a Minister is satisfied that the disclosure under this Act of a document would be contrary to the public interest for a reason referred to in sub-section (1), he may sign a certificate to that effect and such a certificate, so long as it remains in force, establishes conclusively that the document is an exempt document referred to in sub-section (1)

(3) Where a Minister is satisfied as mentioned in sub-section (2) by reason only of matter contained in a particular part or particular parts of a document, a certificate under that sub-section in respect of the document shall identify that part or those parts of the document as containing the matter by reason of which the certificate is given.

(4) The responsible Minister of an agency may, either generally or as otherwise provided by the instrument of delegation, by writing signed by him, delegate to the principal officer of the agency his powers under this section in respect of documents of the agency

(5) A power delegated under sub-section (4), when exercised by the delegate, shall, for the purposes of this Act, be deemed to have been exercised by the responsible Minister

(6) A delegation under sub-section (4) does not prevent the exercise of a power by the responsible Minister.

Cabinet Documents

24 (1) A document is an exempt document if it is :

(*a*) a document that has been submitted to the Cabinet for its consideration or is proposed by a Minister to be so submitted;

(*b*) an official record of the Cabinet;

(*c*) a document that is a copy of, or a part of, a document referred to in paragraph (*a*) or (*b*): or

(*d*) a document the disclosure of which would involve the disclosure of any deliberation or decision of the Cabinet, other than a document by which a decision of the Cabinet was officially published

(2) For the purposes of this Act, a certificate signed by the Secretary to the Department of the Prime Minister and Cabinet certifying that a document is one of a kind referred to in a paragraph of sub-section (1) establishes conclusively that it is an exempt document of that kind.

(3) Where a document is a document referred to in paragraph (1) (*d*) by reason only of matter contained in a particular part or particular parts of the document, a certificate under sub-section (2) in respect of the document shall identify that part or those parts of the document as containing the matter by reason of which the certificate is given.

(4) Sub-section (1) does not apply to a document by reason of the fact that it was submitted to the Cabinet for its consideration or is proposed by a Minister to be so submitted if it was not brought into existence for the purpose of submission for consideration by the Cabinet

(5) A reference in this section to the Cabinet shall be read as including a reference to a committee of the Cabinet.

Executive Council Documents

25 (1) A document is an exempt document if it is ·

(*a*) a document that has been submitted to the Executive Council for its consideration or is proposed by a Minister to be so submitted,

(*b*) an official record of the Executive Council;

(*c*) a document that is a copy of, or of a part of, a document referred to in paragraph (*a*) or (*b*); or

(*d*) a document the disclosure of which would involve the disclosure of any deliberation or advice of the Executive Council, other than a document by which an act of the Governor-General acting with the advice of the Executive Council, was officially published

(2) For the purposes of this Act, a certificate signed by the Secretary to the Executive Council, or a person performing the duties of the Secretary, certifying that a document is

one of a kind referred to in a paragraph of sub-section (1) establishes conclusively that it is an exempt document of that kind.

(3) Where a document is a document referred to in paragraph (1) (*d*) by reason only of matter contained in a particular part or particular parts of the document, a certificate under sub-section (2) in respect of the document shall identify that part or those parts of the document as containing the matter by reason of which the certificate is given.

(4) Sub-section (1) does not apply to a document by reason of the fact that it was submitted to the Executive Council for its consideration, or is proposed by a Minister to be so submitted, if it was not brought into existence for the purpose of submission for consideration by the Executive Council.

Internal Working Documents

26. (1) Subject to this section, a document is an exempt document if it is a document the disclosure of which under this Act :

(*a*) would disclose matter in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency or Minister or of the Government of the Commonwealth; and

(*b*) would be contrary to the public interest.

(2) In the case of a document of the kind referred to in sub-section 7(1), the matter referred to in paragraph (1)(a) of this section does not include matter that is used or to be used for the purpose of the making of decisions or recommendations referred to in sub-section 7(1)

(3) This section does not apply to a document by reason only of purely factual material contained in the document.

(4) This section does not apply to :

(*a*) reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters;

(*b*) reports of a prescribed body or organization established within an agency; or

(*c*) the record of, or a formal statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function.

(5) Where a decision is made under Part III that an applicant is not entitled to access to a document by reason of the application of this section, the notice under section 22 shall state the ground of public interest on which the decision is based.

Documents Affecting Enforcement or Administration of the Law

27. A document is an exempt document if its disclosure under this Act would, or would be reasonably likely to :

(*a*) prejudice the investigation of a breach or possible breach of the law or the enforcement or proper administration of the law in a particular instance;

(*b*) prejudice the fair trial of a person or the impartial adjudication of a particular case;

(*c*) disclose, or enable a person to ascertain, the identity of a confidential source of information in relation to the enforcement or administration of the law;

(*d*) disclose methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law, the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or precedures; or

(*e*) endanger the lives or physical safety of persons engaged in or in connexion with law enforcement.

Documents to which Secrecy Provisions of Enactments Apply

28 (1) A document is an exempt document if it is a document to which a prescribed

provision of an enactment, being a provision prohibiting or restricting disclosure of the document or of information or other matter contained in the document, applies

(2) In this section, 'enactment' includes an Ordinance of the Northern Territory or an instrument (including rules, regulations or by-laws) made under such an Ordinance

Certain Documents Concerning Operations of Agencies

29 A document is an exempt document if its disclosure under this Act would be contrary to the public interest by reason that the disclosure would have a substantial adverse effect on the financial, property or staff management interests of the Commonwealth or of an agency or would otherwise have a substantial adverse effect on the efficient and economical conduct of the affairs of an agency.

Documents Affecting Personal Privacy

30 (1) A document is an exempt document if its disclosure under this Act would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person).

(2) Subject to sub-section (3), the provisions of sub-section (1) do not have effect in relation to a request by a person for access to a document by reason only of the inclusion in the document of matter relating to that person

(3) Where a request is made to an agency or Minister for access to a document of the agency, or an official document of the Minister, that contains information of a medical or psychiatric nature concerning the person making the request and it appears to the principal officer of the agency, or to the Minister, as the case may be, that the disclosure of the information to that person might be prejudicial to the physical or mental health or well-being of that person, the principal officer or Minister may direct that access to the document, so far as it contains that information, that would otherwise be given to that person is not to be given to him but is to be given instead to a medical practitioner to be nominated by him

Documents Affecting Legal Proceedings or Subject to Legal Professional Privilege

31 (1) A document is an exempt document if its disclosure under this Act would be reasonably likely to have a substantial adverse effect on the interests of the Commonwealth or of an agency in or in relation to pending or likely legal proceedings

(2) A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege

(3) A document of the kind referred to in sub-section 7(1) is not an exempt document by virtue of sub-section (2) of this section by reason only of the inclusion in the document of matter that is used or to be used for the purpose of the making of decisions or recommendations referred to in sub-section 7(1)

Documents Relating to Trade Secrets &c.

32 (1) A document is an exempt document if its disclosure under this Act would disclose information concerning a person in respect of his business or professional affairs or concerning a business, commercial or financial undertaking, and :

(*a*) the information relates to trade secrets or relates to other matter the disclosure of which under this Act would be reasonably likely to expose the person or undertaking unreasonably to disadvantage, or

(*b*) the disclosure of the information under this Act would be contrary to the public interest by reason that the disclosure would be reasonably likely to impair the ability of the Commonwealth or of an agency to obtain similar information in the future.

(2) The provisions of sub-section (1) do not have effect in relation to a request by a person for access to a document by reason only of the inclusion in the document of information concerning that person in respect of his business or professional affairs or of information

concerning a business, commercial or financial undertaking of which that person, or a person on whose behalf that person made the request, is the proprietor.

Documents Affecting National Economy

33. A document is an exempt document if its disclosure under this Act would be contrary to the public interest by reason that it would be reasonably likely to have a substantial adverse effect on the national economy.

Documents Containing Material Obtained in Confidence

34 A document is an exempt document if its disclosure under this Act would constitute a breach of confidence.

Documents Disclosure of which would be Contempt of Parliament or Contempt of Court

35. A document is an exempt document if public disclosure of the document would, apart from this Act and any immunity of the Crown :

(*a*) be in contempt of court;

(*b*) be contrary to an order made or direction given by a Royal Commission or by a tribunal or other person or body having power to take evidence on oath, or

(*c*) infringe the privileges of the Parliament of the Commonwealth or of a State or of a House of such a Parliament or of the Legislative Assembly of the Northern Territory.

Privileged Documents

36. (1) Where the Attorney-General is satisfied that the disclosure under this Act of a particular document, or of any document included in a particular class of documents, would be contrary to the public interest on a particular ground, being a ground that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the contents of the document, or of a document included in that class, as the case may be, should not be disclosed, he may sign a certificate that he is so satisfied, specifying in the certificate the ground concerned, and, while such a certificate is in force, but subject to Part V, the document, or every document included in that class, as the case may be, is an exempt document.

(2) A certificate under sub-section (1) in relation to a particular document shall be deemed to refer also to every document that is substantially identical to that document.

PART V — REVIEW OF DECISIONS

Applications to Administrative Appeals Tribunal

37. (1) Application may be made to the Administrative Appeals Tribunal for review of a decision refusing to grant access to a document in accordance with a request or deferring the provision of access to a document.

(2) ubject to sub-section (3), in proceedings under this part, the Tribunal has power, in addition to any other power, to review any decision that has been made by an agency or Minister in respect of the request and any decision of the Attorney-General to give a certificate under section 36 that is applicable to the document and to decide any matter in relation to the request that, under this Act, could have been or could be decided by an agency or Minister, and any decision of the Tribunal under this section has the same effect as a decision of the agency or Minister.

(3) Where, in proceedings under this section, it is established that a document is an exempt document, the Tribunal does not have power to decide that access to the document, so far as it contains exempt matter, is to be granted.

(4) The powers of the Tribunal do not extend to reviewing a decision of an agency or Minister, for the purposes of sub-section 26(1), that the disclosure of a document would be contrary to the public interest.

(5) Where, under a provision of Part IV, it is provided that a certificate of a specified kind establishes conclusively, for the purposes of this Act, that a document is an exempt document and such a certificate has been given in respect of a document, the powers of the Tribunal do not extend to reviewing the decision to give the certificate or the existence of proper grounds for the giving of the certificate.

(6) The powers of the Tribunal under this section extend to matters relating to charges payable under this Act in relation to a request.

Internal Review

38 (1) Where a decision has been made, in relation to a request to an agency, otherwise than by the responsible Minister or principal officer of the agency (not being a decision on a review under this section), the applicant may, within 28 days after the day on which notice of the decision was given to the applicant in accordance with section 22, apply to the principal officer of the agency for a review of the decision in accordance with this section

(2) A person is not entitled to apply to the Tribunal for a review of a decision in relation to which sub-section (1) applies unless —

(*a*) he has made an application under that sub-section in relation to the decision; and

(*b*) he has been informed of the result of the review or a period of 14 days has elapsed since the day on which he made that application.

(3) Where an application for a review of a decision is made to the principal officer in accordance with sub-section (1), he shall forthwith arrange for himself or a person (not being the person who made the decision) authorized by him to conduct such reviews to review the decision and to make a fresh decision on the original application

(4) Where :

(*a*) an application for a review of a decision has been made in accordance with sub-section (1); and

(*b*) the applicant has not been informed of the result of the review within 14 days after the day on which he made that application,

an application to the Tribunal for a review of the decision may be treated by the Tribunal as having been made within the time allowed under the *Administrative Appeals Tribunal Act* 1975 if it appears to the Tribunal that there was no unreasonable delay in making the application to the Tribunal.

Application to Tribunal where Decision Delayed

39. (1) Subject to this section, where :

(*a*) a request has been made to an agency or Minister in accordance with section 17;

(*b*) a period of 60 days has elapsed since the day on which the request was received by or on behalf of the agency or Minister, and

(*c*) notice of a decision on the request has not been received by the applicant,

the principal officer of the agency or the Minister shall, for the purpose of enabling an application to be made to the Tribunal under section 37, be deemed to have made, on the last day of that period, a decision refusing to grant access to the document

(2) Where a complaint is made to the Ombudsman under the *Ombudsman Act* 1976 concerning failure to make and notify to the applicant a decision on a request (whether the complaint was made before or after the expiration of the period referred to in sub-section (1)), an application to the Tribunal under section 37 of this Act by virtue of this section shall not be made before the Ombudsman has informed the applicant of the result of the complaint in accordance with section 12 of the *Ombudsman Act* 1976.

(3) Where such a complaint is made before the expiration of the period referred to in sub-section (1), the Ombudsman, after having investigated the complaint, may, if he is of the opinion that there has been unreasonable delay by an agency in connexion with the request, grant to the applicant a certificate certifying that he is of that opinion, and, if the Ombudsman does so, the principal officer of the agency or the Minister, as the case requires,

shall, for the purposes of enabling application to be made to the Tribunal under section 37, be deemed to have made, on the date on which the certificate is granted, a decision refusing to grant access to the document.

(4) The Ombudsman shall not grant a certificate under sub-section (3) where the request to which the complaint relates was made to, or has been referred to, a Minister and is awaiting decision by him

(5) Where, after an application has been made to the Tribunal by virtue of this section but before the Tribunal has finally dealt with the application, a decision, other than a decision to grant, without deferment, access to the document in accordance with the request, is given, the Tribunal may, at the request of the applicant, treat the proceedings as extending to a review of that decision in accordance with this Part.

(6) Before dealing further with an application made by virtue of this section, the Tribunal may, on the application of the agency or Minister concerned, allow further time to the agency or Minister to deal with the request.

Parties

40. For the purposes of this Part and of the application of the *Administrative Appeals Tribunal Act* 1975 in respect of proceedings under this Part :

(*a*) a decision given by a person on behalf of an agency shall be deemed to have been given by the agency; and

(*b*) in the case of proceedings by virtue of section 39, the agency or Minister to which or to whom the request was made shall be a party to the proceedings.

Onus

41. In proceedings under this Part, the agency or Minister to which or to whom the request was made has the onus of establishing that a decision given in respect of the request was justified or that the Tribunal should give a decision adverse to the applicant.

Application of Section 28 *of Administrative Appeals Tribunal Act*

42 Where, in relation to a request, the applicant has been given a notice in writing complying with section 22, section 28 of the *Administrative Appeals Tribunal Act* 1975 does not apply to the decision on that request.

Orders under Section 35 *of Administrative Appeals Tribunal Act*

43. In proceedings under this Part, the Tribunal shall make such order under sub-section 35 (2) of the *Administrative Appeals Tribunal Act* 1975 as it thinks necessary having regard to the nature of the proceedings and, in particular, to the necessity of avoiding the disclosure to the applicant, in the proceedings, of exempt matter.

Production of Exempt Documents

44 (1) Where there are proceedings before the Tribunal under this Act in relation to a document that is claimed to be an exempt document, section 37 of the *Administrative Appeals Tribunal Act* 1975 does not apply in relation to the document but if the Tribunal is not satisfied, by evidence on affidavit or otherwise :

(*a*) that the document is an exempt document; and

(*b*) in the case of a document that is an exempt document by virtue of a certificate of the Attorney-General under section 36, that the giving of the certificate was justified,

it may require the document to be produced for inspection by members of the Tribunal only and if, upon the inspection, the Tribunal is satisfied that the document is an exempt document and, in the case of a document referred to in paragraph (b), that the giving of the certificate was justified the Tribunal shall return the document to the person by whom it was produced without permitting any person other than a member of the Tribunal

as constituted for the purposes of proceeding, or a member of the staff of the Tribunal in the course of the performance of his duties as a member of that staff, to have access to the document or disclosing the contents of the document to any such person

(2) The Tribunal may require the production, for inspection by members of the Tribunal only, of an exempt document for the purposes of determining whether it is practicable for an agency or a Minister to grant access to a copy of the document with such deletions as to make the copy not an exempt document and, where an exempt document is produced by reason of such a requirement, the Tribunal shall, after inspection of the document by the members of the Tribunal as constituted for the purposes of the proceeding, return the document to the person by whom it was produced without permitting any person other than such a member of the Tribunal, or a member of the staff of the Tribunal in the course of the performance of his duties as a member of that staff, to have access to the document or disclosing the contents of the document to any such person

(3) Notwithstanding sub-sections (1) and (2) but subject to sub-section (4), the Tribunal is not empowered, in any proceedings, to require the production of a document in respect of which there is in force a certificate under sections 23, 24 or 25.

(4) Where a certificate of a kind referred to in sub-section (3) identifies a part or parts of the document concerned in the manner provided in sub-sections 23(3), 24(3) or 25(3), sub-section (3) does not prevent the Tribunal from requiring the production, in proceedings before the Tribunal under this Act in relation to the document, of a copy of so much of the document as is not included in the part or parts so identified.

(5) Sub-sections (1) and (2) apply in relation to a document in the possession of a Minister that is claimed by the Minister not to be an official document of the Minister as if references in those sub-sections to an exempt document were references to a document in the possession of a Minister that is not an official document of the Minister

(6) Sub-section (1) or (2) does not operate so as to prevent the Tribunal from causing a document produced in accordance with that sub-section to be sent to the Federal Court of Australia in accordance with section 46 of the *Administrative Appeals Tribunal Act* 1975, but, where such a document is so sent to the Court, the Court shall do all things necessary to ensure that the contents of the document are not disclosed (otherwise than in accordance with this Act) to any person other than a member of the Court as constituted for the purpose of the proceedings before the Court or a member of the staff of the Court in the course of the performance of his duties as a member of that staff

Evidence of Certificates

45. In proceedings before the Tribunal under this Part, evidence of a certificate under sections 23, 24 or 25, including evidence of the identity or nature of the document to which the certificate relates, may be given by affidavit or otherwise and such evidence is admissible without production of the certificate or of the document to which it relates

PART VI—MISCELLANEOUS

Protection Against Actions for Defamation or Breach of Confidence

46. (1) Where access has been given to a document and

(*a*) the access was required by this Act to be given; or

(*b*) the access was authorized by a Minister, or by an officer having authority, in accordance with section 21 or 38, to make decisions in respect of requests, in the *bona fide* belief that the access was required by this Act to be given,

no action for defamation or breach of confidence lies, by reason of the authorizing or giving of the access, against the Commonwealth or an agency or against the Minister or officer who authorized the access or any person who gave the access

(2) The giving of access to a document (including an exempt document) in consequence

of a request shall not be taken, for the purposes of the law relating to defamation or breach of confidence, to constitute an authorization or approval of the publication of the document or of its contents by the person to whom the access was given.

Protection in Respect of Offences

47. Where access has been given to a document and.

(*a*) the access was required by this Act to be given; or

(*b*) the access was authorized by a Minister, or by an officer having authority, in accordance with section 21 or 38, to make decisions in respect of requests, in the *bona fide* belief that the access was required by this Act to be given,

neither the person authorizing the access nor any person concerned in the giving of the access is guilty of a criminal offence by reason only of the authorizing or giving of the access.

Reports to Parliament

48 (1) The Minister administering this Act shall, as soon as practicable after the end of each year ending on 31 December prepare a report on the operation of this Act during that year and cause a copy of the report to be laid before each House of the Parliament.

(2) Each agency shall, in relation to the agency, and each Minister shall, in relation to his official documents, furnish to the Minister administering this Act such information as he requires for the purposes of the preparation of reports under this section and shall comply with any prescribed requirements concerning the furnishing of that information and the keeping of records for the purposes of this section.

Regulations

49. (1) The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters that by this Act are required or permitted to be prescribed, or are necessary or convenient to be prescribed for carrying out or giving effect to this Act, and in particular, making provision for or in relation to :

(*a*) the making of charges of amounts, or at rates, fixed by or in accordance with the regulations for access to documents (including the provision of copies or transcripts) in accordance with this Act, including requiring deposits on account of such charges; and

(*b*) the officers who may give decisions on behalf of an agency.

(2) Where, as a result of a request, access is given to an exempt document, regulations under this Act relating to charges apply as if the access had been given in accordance with this Act.

□

Document 10—Britain

Public Right to Access

[The following are excerpts from the Green Paper, published in 1979, by the UK Government dealing with openness in government in the British context.]

The major argument for a public right of access is basically that those seeking information have the right to obtain what they want when they want it, subject to clear exemptions, rather than having to wait on a government initiative or discretion to release material.

Among those in this country who support a public right of access to information there is no consensus about the means by which this should be secured All have examined foreign experience, especially in Sweden and the United States, and have drawn heavily on varying features in the legislation in these countries The National Executive of the Labour Party (NEC) favour a Freedom of Information Act which would apply to the records of both central and local government, of nationalised industries and other organisations in the public sector, of police authorities and of universities and colleges The Outer Circle Policy Unit similarly favours an Act but would confine it to central government and regional and area health authorities This is the approach adopted in the Official Information Bill still before the House of Commons. Justice, the British section of the International Committee of jurists, also favours a general right of access to government files, in the form not of a legal right but of a code of practice monitored by the parliamentary commissioner for administration (who is also given a similar function under the Official Information Bill).

All these schemes, and those abroad, include provision for the exemption from disclosure of documents within various categories The proponents of a public right of access seek in this way to reconcile the need for more openness with the recognition of the need for an appropriate degree of confidentiality in cases where they believe it to be required But there is considerable variation in the categories exempted. As in the countries studied abroad, all the proposals referred to above would provide exemptions for information relating to national security or defence, international relations, most law enforcement and the investigation of crime, the confidence of the citizen, and Cabinet papers The NEC scheme would extend the exemptions to certain matters of labour relations, and 'Justice' would extend them to commercial and industrial matters, advice to ministers and to internal working papers The Official Information Bill in its present form, on the other hand, contains none of these additional categories.

The discussions during the committee stage of the Official Information Bill currently before parliament have usefully served to focus attention on three major issues on which decisions must be taken before any system providing a public right of access is introduced in this country These issues can conveniently be discussed under three headings: the extent to which the scheme has retrospective effect, the extent to which certain categories of information are exempted from the scheme; and the choice of machinery for monitoring or enforcing the application of the scheme

From the administration's point of view, the difficulties of providing access would vary according to whether such access was to be confined to documents written after the right was created (following the practice adopted by most other countries) or made retrospective, (as proposed in the Official Information Bill).

Files contain a range of documents, both classified and unclassified, relating to individuals or containing material it would generally not be in the public interest to reveal. Before a right of access was created this material will have been compiled and written without the knowledge of this right of access and may prove difficult to separate. For example, discussion of exchange control policy might contain examples of evasion, where companies' or individuals' names are included. Even if deleted, those people with enough knowledge and experience in this field can either deduce the correct names or, worse, speculate about several names, with potentially unacceptable consequences for subsequent law enforcement. Experience abroad, especially in America, has shown how difficult it is to be sure that exempted material is really protected where partial access is involved. Also, 'political' (i.e., policy) arguments are often expressed alongside 'factual' points. This system is the natural corollary of the protection which internal communications have hitherto enjoyed, and for administrative purposes (whether inside a government department or a private firm), it is far the most convenient and efficient system. To make material available under a public right of access would pose considerable problems both of principle and of practice. This applies equally to the sifting out of complete documents, as it does to the editing of partially exempt matter.

First, all material falling within one or more of the categories of information exempted under the scheme would have to be removed before the file was handed over for inspection and that could be a major undertaking, often involving decisions at a senior level. This has proved a formidable task in the United States, where retrospection and the huge quantity of material has complicated what is seen, in any case, on current files, as an exercise fraught with interpretative difficulty, especially where definitions of exemptions have to be tested in the courts. All Scandinavian countries acknowledge this area to be one offering some of the greatest problems particularly where the courts have a major role, and where this results in rulings which are not always consistent.

Then there is the matter of scale and attendant costs. One ministry in Whitehall alone has between 3 and 4 million files in current use plus over 100 miles of shelving in archives which are still closed under the 30 year rule for public records It has been suggested that the 30 year period of closure for public records should be reduced. This is an issue of importance both to historians and to the search for more open government, and in those respects a reduction might be welcome However, the 30 year period compares favourably with that adopted in other countries A reduction would require legislation and would involve substantial costs, over and above those entailed by further measures to achieve openness in present day government. In any event it would not remove the problems associated with public access to more recent material. The sheer volume now in existence and stored under the present system would create major administrative and manpower implications in classifying, sifting and making documents available. Much of this material might be exempt, but a system would have to be devised to help the applicant find disclosable documents of interest to him.

Moreover, there is a significant issue of principle entailed in altering retrospectively the character of a document. Even when 'exempt' material has been removed from a file, what remains available for access will have been written by people who believed they were writing in confidence Such people would not only be civil servants There will be representatives of organisations or companies outside central government, or private citizens. They are entitled to consideration.

EXEMPTIONS FROM DISCLOSURE

The character and effects of schemes which include a public right of access are largely determined by the extent to which certain categories of information are exempt from disclosure As was pointed out earlier, there is general acceptance of the need for certain

exceptions from a general right, and there are certain common features in the categories of information which are exempted from disclosure under schemes which exist overseas, as well as in various proposals which have been advanced in this country. It is notable that, with the exception of the Official Information Bill, all these schemes and proposals would exempt from disclosure working papers including those which contain advice from officials (though even that Bill accepts that in this case the application of a right of access should be modified)

The question how far papers relevant to the formulation of policy should be open to disclosure raises difficult issues A great deal of such information is already published in the form of Green Papers, discussion documents, evidence to inquiries and the like It is argued however that public participation in the formulation of government policy requires a much greater readiness to disclose the considerations, opinions and arguments which were canvassed in reaching a particular decision. It is sometimes held that information about internal disagreements amongst ministers or between ministers and their advisers, since they must inevitably occur in any case, is necessary for full public understanding of the reasons why certain policies were adopted, and certain courses followed

Against this, there is the more compelling argument that those who come together and act jointly in pursuit of a common purpose need the assurance of privacy in their deliberations This is true of any walk of life and in any organisation, be it social, commercial or political; and government is no exception Unless the participants can talk freely among themselves, possibilities and opinions which may be unpopular or embarrassing may not be adequately explored and discussed The private conversation would tend to assume importance at the expense of thorough discussion by the whole body, to the detriment of sound decision-taking and the orderly conduct of business Moreover, under our constitutional conventions civil servants have for the most part been anonymous, offering advice in the assurance of confidence and hence free to express their views frankly It is their duty to expose even uncomfortable facts or aspects of a question in order to present as full a picture as possible of the issues which ministers have to decide and for which they are accountable to parliament. The alteration of the conventions within which they at present proffer advice could well affect adversely the value of that advice.

Another important category which should be considered for exemption is commercial information, whether disclosed voluntarily or not, or whether received by, or generated by, the government Disclosure of such information, without the consent of those who supplied it, could undermine government's relations with industry and could jeopardise competitive positions Where government is itself trading or exploiting information it owns, it would give an advantage to its competitors, including those overseas, and allow opportunities for the results of research which had been financed from public funds to be exploited for private gain

The exceptions to the obligation to disclosure must clearly include information whose unauthorised disclosure would be an offence under a revision of the Official Secrets Act, but they should also encompass certain other categories, including financial and economic matters whose publication could be damaging (e.g , to the reserves or the exchange rate).

Rather different considerations arise in dealing with proposals for the publication of manuals and guides dealing with the administration of major areas of legislation, particularly in the taxation and social security fields Much of this information of course should be available to the general public and indeed is already provided in other publications But there is also material which offers guidance and advice to officials on such matters as the detection of fraudulent claims for benefits and the evasion of taxes and duties. To make these parts of the internal manuals generally available would clearly be contrary to the best interests of the community at large.

The schemes of public right of access studied abroad have given individual members of the public a legal entitlement and they have imposed legal obligations on ministers. The

courts have been given the task of resolving disputes about access as matters of fact and law. Decisions, for example, as to whether particular documents fell within an exempt category or not would be for legal interpretation, and enforcement by a judicial process. Many of the cases which have come before the courts in other countries have required a good deal of difficult interpretation, often in politically contentious fields.

It is doubtful whether in the British context such essentially political matters could best be determined in the courts. As an alternative it might be suggested that the monitoring responsibility should lie with a new tribunal or office, or that an existing body or office-holder, such as the parliamentary commissioner for administration, might be given this jurisdiction In either case political judgement would be replaced by the jurisdiction of a quasi-judicial body The tribunal or office-holder would decide cases of dispute and where necessary (independently of the view of parliament) pronounce strongly against the ministerial decision It would, as a consequence, be directly drawn into judgements in difficult and controversial political areas For the parliamentary commissioner, this would represent an entirely different role of a quasi-judicial character with the PCA acting more as a court than as an investigating office in support of members of parliament.

A public right of access to information in general policy areas, where the ultimate responsibility for disclosure lay with the courts or with a quasi-judicial tribunal or office-holder, would represent a substantial change in the existing constitutional arrangements in this country. Where government transactions directly affect the interest of the individual citizen, the roles of the courts, or quasi-judicial bodies of one kind or another and of the PCA, including jurisdiction over the production of documents by government in relation to particular cases if the provision of information in general policy areas, with their largely political content, were made a matter for legal or quasi-legal judgement rather than of accountability to parliament.

THE WAY FORWARD

The issues discussed in the paragraphs above, notably in respect of retrospective application and of enforcement, are raised in an extreme form by the scheme provided for in the Official Information Bill. Overseas experience amply demonstrates the desirability of an evolutionary approach in this field and the government cannot accept that a statutory right of access which could affect adversely and fundamentally the accountability of ministers to parliament is the right course to follow. There are other methods of securing more open government which do not carry such dangers.

The freedom of information systems that have been developed in other countries have to be seen in the context of the constitutional arrangements of those countries, and their relevance to our situation must be examined in the light of differences between those constitutional arrangements and our own This is of particular importance in considering the role played by the courts in other countries. In our constitutional system the government is in parliament· members of the government are almost invariably members of parliament; it is to parliament that government is accountable; it is to parliament that the government comes for legislative sanction for its policy decisions; it is in parliament in the first instance that the government explains and defends its actions An approach to greater openness that does not respect these fundamental features of our system—and indeed other features, such as the collective responsibility of ministers and their relationships with their civil servants—will undermine rather than strengthen British parliamentary democracy.

In the government's view the essential requirements of any scheme of access to official information is that it should satisfy public demand so far as is reasonable and practicable; that it should be fully compatible with the constitutional and parliamentary systems of this country; and that the costs should be commensurate with the public benefit.

Greater openness by any means is costly although opinions differ as to the cost of any

given approach. But the government at any rate cannot shirk the fact that extra money and staff for the release of information can only be made available if they are diverted from some other use. Public expenditure is necessarily under constraint, and any decision to spend more involves a difficult choice between priorities. More money for information means less money for something else Resource constraints, as well as experience overseas, suggest that a gradual approach is called for.

There is no doubt that more can be done to secure the aims of the information directive described earlier. Departments can improve the arrangements which they make for replying to enquiries for background information and for assembling information in response to them. More departments can prepare and make available on request—as some do already—an index under appropriate headings of departmental subjects showing what material has been published, what is available on request, and what can be expected (e g , material in course of preparation, regular returns with the dates when they are produced), together with a general statement of individual departmental practice.

In conjunction with this list, departments might offer a service through their libraries which would supply copies of material listed in the index, or alternatively provide access to them on the premises The libraries could also, on suitable occasions, refer enquirers to the appropriate departmental officials for information on current issues which was not available on library papers.

Nevertheless, it is generally agreed that developments such as these, valuable as they are as improvements to the present system, do not go far enough, and do not satisfy legitimate criticism that not enough information has been released under the directive A more substantial initiative is necessary.

It is acknowledged that the blanket coverage of Section 2 of the Official Secrets Act 1911 has outlived its usefulness. It is not disputed, however, that some information requires the protection of the criminal law against unauthorised disclosure There is broad agreement on the categories to be protected, and the form which statutory protection should take The government's proposals for new legislation in this regard were set out in the White Paper of July 1978*. There can be and are differences of opinion on detail, but the time is now ripe to bring this matter to a legislative conclusion, on the general lines of the White Paper. This remains, in the government's view, a necessary precursor to greater openness.

A CODE OF PRACTICE

A code of practice on access to official information, which the government was fully committed to observe, would be a major step forward. Such a scheme could be devised to meet the essential requirements set out above. Access would be given to official documents and information other than in fields which were specifically exempted from the operation of the code The initiative in the release of material would no longer rest exclusively with the government But accountability to parliament would be retained and the jurisdiction of the courts excluded There would be no retrospective application.

A code of practice is the central feature of the non-statutory scheme canvassed by *Justice* in their report† on freedom of information The key to the successful introduction and operation of any code of practice would lie in the way in which a government signified its commitment to the working of the code. This would set the standard by which ministerial operation of the code would be judged. A statement of intent, whereby ministers undertook to consider all requests for documents and information favourably unless there were overwhelming and publicly declared reasons to decide against release, would create a climate of openness within a short time of the code being introduced. Ministers would exercise their

*Reform of Section 2 of the Official Secrets Act 1911 (Cmnd. 7285)

†"Freedom of Information", a report by *Justice* (London 1978).

discretion within the spirit of the statement of intent and would be committed to providing access wherever possible, even where a document would be formally exempted under the provisions of the code.

The drawing up of a code would not be easy As the *Justice* code illustrates, the same issues arise as under any scheme for a statutory right of public access to documents—the definition of exempted material, retrospective application and enforcement, discussed in the paragraphs above The authors of the *Justice* code tackle these issues by suggesting a set of categories of information which would normally be exempt from disclosure, restricting the formal application of the code to material prepared after the code comes into effect, and proposing that the exercise of ministerial discretion in applying the code should be subject to monitoring by the parliamentary commissioner for administration.

There is scope for discussion about the detailed content of a code, and in particular the definitions of categories of information which would be exempt from disclosure The choice of parliamentary commissioner as the monitoring authority under the *Justice* scheme needs careful consideration since this choice has the implications for his existing functions which have already been discussed, and some other alternative machinery which avoided these potential difficulties might have to be found Although the PCA would not have the final word, as would a court, the judgement he would arrive at would in many cases be different in quality from the conclusions he reaches when investigating complaints of maladministration.

However, the government favours a code of practice approach. Its advantages lie not only in creating the right climate which would inform all considerations of requests to make material available, but also in the flexibility of the system in defining the categories of documents which would be exempt. The code could be readily revised, especially if early experience of its operation showed it to be either unnecessarily restrictive in some areas, or not precise enough in others. The government believes such a code will significantly increase the amount of information, chosen by an inquirer, that will be made available. It therefore offers an assurance of a significant development of open government which would be consistent with the overriding principle of ministerial accountability to parliament.

The detailed provisions of such a code; the question of whether or not it should, from its introduction, be put on a statutory footing, and if so, in what form; and the appropriate choice of machinery for monitoring the code's application, are matters for further detailed examination It would be the government's intention to recommend to parliament that a select committee of the House of Commons should be appointed for this purpose.



Access to Administrative Information

[The Netherlands' Access to Administrative Information Law came into force in November 1978. Given below is the text of the Law.]

Article 1

1. A request for information, addressed to a government body, shall be complied with unless there is an objection to this on any of the grounds referred to in Article 4 By government bodies this Act understands: Our ministers, administrative bodies of provinces and municipalities, and any other bodies designated by a General Order in Council.

2 A request for information, contained in documents drafted for the benefits of internal consultation, shall be granted except in so far as they relate to ·

(*a*) data still being processed or which, although ready, would give as such an incomplete and therefore an inaccurate picture;

(*b*) personal views of those who bear political responsibility or public servants Information will be given about factual data concerning the matter to which the request relates, prognoses and policy alternatives, contained in these documents

3. By General Order in Council, rules will be laid down concerning the application of the provisions of the first and second paragraphs above

4 Further rules concerning the application of the provisions of the paragraphs 1-3 and of the General Order in Council, mentioned in paragraph 3, may be fixed,

(*a*) by the Prime Minister in concurrence with the feeling of the council of ministers for the field of central government and

(*b*) by the administrations of provinces and municipalities and the other government bodies, designated in virtue of the first paragraph of this Article for their fields

Article 2

1. The government body directly concerned shall of its own accord provide information about its policy, including the preparation and implementation thereof as soon as this is in the interests of a sound and democratic administration.

2. The government body shall exercise care to ensure that the information is supplied in an intelligible form; in such a way that it reaches interested parties and persons as far as possible; and that it is made available in time for such parties to be able to state their views in due time in the course of the administrative process.

Article 3

1. Without prejudice to the provisions of law concerning publication laid down elsewhere, our minister who is directly concerned shall see to the publication of policy recommendations made to the central government by external advisory commissions, where necessary and if possible accompanied by explanation Publication takes place within thirty days after these recommendations have been received.

2. External advisory commissions are bodies whose task it is to advise Us or Our ministers and whose members include no public servants, part of whose function includes advising their own Minister on the problems confronting the advisory commission

A public servant who is the secretary or a consultative member of an advisory commission, shall not be regarded as a member thereof for the purposes of this provision.

3. Recommendations may be made public by :

(*a*) incorporation of them in a generally available publication, or

(*b*) making them generally available in a separate publication, or

(*c*) making copies available for public inspection, retention or loan.

4. The publication shall be communicated in the Netherlands Official Gazette.

Article 4

The information pursuant to Articles 1 to 3 shall not be divulged if it might:

(*a*) endanger the unity of the crown, or

(*b*) damage the security of the state.

It shall also not be divulged if it concerns

(*c*) data of enterprises and production processes in so far as they have been furnished to the government confidentially.

Nor shall it be divulged if and in so far as its importance does not outweigh the following interests:

(*d*) the Netherlands relations with other countries;

(*e*) the economic and financial interest of the state and other statutory bodies;

(*f*) the detection and prosecution of punishable acts;

(*g*) inspection, control and supervision by or on behalf of government institutions;

(*h*) the right of each individual to respect for his personal privacy and the protection of the results of medical and psychological examinations relating to individual cases;

(*i*) the prevention of unfair advantage or disadvantage to the natural or legal persons concerned, or to third parties.

Article 5

1 Before three years have elapsed from the time this Act comes into force, then subsequently every five years thereafter, Our Prime Minister, Minister of General Affairs and Our Minister of Home Affairs shall send to the States-General a report on its implementation.

2 This report shall incorporate the findings of the government bodies referred to in Article 1, of administrative scientists, of representatives of the publicity media and representatives of the national public servants' organisations.

Article 6

The provisions of Articles 3 and 4 apply, or as the case may be, apply correspondingly to recommendations produced for provincial and municipal administrations as well as for the other bodies designated pursuant to Article 1. Such publication shall be the responsibility of these bodies; it shall be announced in an appropriate periodical.

Article 7

Without prejudice to legal provisions laid down elsewhere, rules may be laid down pursuant to a General Order in Council setting fees charged for requested documents supplied by institutions of the central government under the provisions of Articles 1 to 3.

Article 8

This Act does not impose the obligation to divulge recommendations produced before the Act takes effect.

Article 9

The Council of State Act shall be amended as follows. A new Article shall be inserted under Article 25, stating:

Article 25a

1. Our minister who is directly concerned shall exercise care to ensure the publication of:

(*a*) recommendations by the Council requested by Us concerning Bills, agreements with other powers and International Legal Organizations and drafts of General Orders in Council and of other Royal Decrees;

(*b*) recommendations and other proposals made to Us pursuant to Article 16

2. Publication of the recommendations referred to in paragraph 1(*a*) shall take place together with publication of the text submitted to the Council, in so far as this has been amended after the advice was requested, and of the subsequent report to Us. This shall take place as follows:

—for recommendations concerning Bills lodged by Us· simultaneously with their submission to the Second Chamber of the States-General;

—for recommendations of Bills made to Us by the States-General simultaneously with the promulgation of the Act or, if We do not approve the Bill, simultaneously with the publication of the subsequent report to Us;

—for recommendations concerning agreements with other powers and international legal organizations to be submitted to the States-General for tacit approval simultaneously with their submission to the States-General,

—for recommendations concerning General Orders in Council and other Royal Decrees simultaneously with their promulgation.

Publication of nominations and other proposals made to Us pursuant to Article 16, shall take place together and simultaneously with publication of the subsequent report to Us. It shall take place in the manner prescribed in Article 3, paragraphs 3 and 4 of the Openness of Administration Act.

3. Publication shall not take place:

(*a*) in the cases referred to in Article 4 of the Openness of Administration Act,

(*b*) if any recommendation referred to in paragraph 1(a) reflects unqualified approval, or contains only editorial observations.

4. The Council's recommendations, referred to in paragraph 1 hereof shall contain proposals concerning the application of the provisions of paragraph 3

Article 10

This Act may be cited as Openness of Administration Act It shall come into force at a date to be determined by Us.

General Order in Council in Pursuance of Article 1 *of the Law on the Access to Administrative Information*

Article 1

By 'information' is understood· data, laid down in documents, 'documents' are· written papers and other material containing data and held by government bodies and by institutions, services and enterprises, which operate under the responsibility of these bodies. 'documents' do not include drafts and copies of papers to be sent or which have been sent, until it may be assumed that these have reached the addressee.

Article 2

A request for information may be made to government bodies and to institutions, services and enterprises, which operate under the responsibility of these bodies The applicant shall state the matter on which he wishes to receive information

Article 3

The decision on a request for information shall be taken by or on behalf of the government body.

Article 4

1. The government body shall provide the information by:

(*a*) giving a copy,

(*b*) allowing cognizance to be taken of the contents of,

(*c*) giving an excerpt or summary of the contents of,

(*d*) furnishing oral information about the contents of the documents containing the desired information.

2. The government body shall provide the information within a reasonable space of time.

Article 5

In choosing between the forms of information referred to in Article 4, the government body shall be guided by the preference of the enquirer, with this understanding, that the importance of smooth progress of work is taken into consideration, and that the information provided concerning documents drawn up for internal consultation is couched in an unattributable form.

Article 6

A decision to reject a request for information shall be conveyed to the enquirer in writing and stating motives should the enquirer persist by his request.

Article 7

If the request relates to data held by a government body or by an institution, service or enterprise operating under its control other than the one to which the request has been addressed, the enquirer shall be directed to go there. If the request has been made in writing, then it shall be forwarded and the enquirer notified of this forwarding.



Document 12—India

The Official Secrets Act, 1923

[India's Official Secrets Act goes back to 1923. It was subsequently amended, marginally, from time to time. We are reproducing the text of the Act indicating the amendments in the footnotes.]

THE OFFICIAL SECRETS ACT 1923

Act No 19 of 1923[1]

An Act to consolidate and amend the law [2]* * * relating to official secrets.
(*2nd April* 1923.)

[3]* * * * * *

Whereas it is expedient that the law relating to official secrets * * * should be consolidated and amended;

It is hereby enacted as follows :-

Short Title, Extent and Application

[4][1. (1) This Act may be called the Official Secrets Act, 1923.

(2) It extends to the whole of India and applies also to servants of the Government and to citizens of India outside India]

Definitions

2 In this Act, unless there is anything repugnant in the subject or context,—

(1) any reference to a place belonging to Government includes a place occupied by any department of the Government, whether the place is or is not actually vested in Government;

[5]* * * * * *

(2) expressions referring to communicating or receiving include any communicating or receiving, whether in whole or in part, and whether the sketch, plan, model, article, note, document, or information itself or the substance, effect or description thereof only be communicated or received; expressions referring to obtaining or retaining any sketch, plan, model, article, note or document include the copying or causing to be copied of the whole

[1]The Act has been extended to Goa, Daman and Diu by Reg 12 of 1962, 3 and Sch ; to Dadra and Nagar Haveli by Reg 6 of 1963, s. 2 and Sch. I, Pondicherry by Reg. 7 of 1963, s 3 and Sch I and to Laccadive, Minicoy and Amindivi Islands by Reg 8 of 1965, s 3 and Sch.

[2]The words "in the Provinces" were omitted by the A O 1950.

[3]First two paragraphs of the Preamble were omitted, *ibid.*

[4]Subs by Act 24 of 1967, s 2, for the former section.

[5]Cl. (1a), ins by the A.O 1937, was rep. by the A O 1948

or any part of any sketch, plan, model, article, note, or document; and expressions referring to the communication of any sketch, plan, model, article, note or document include the transfer or transmission of the sketch, plan, model, article, note or document;

(3) "document" includes part of a document;

(4) "model" includes design, pattern and specimen:

(5) "munitions of war" includes the whole or any part of any ship, submarine, aircraft, tank or similar engine, arms and ammunition, torpedo, or mine intended or adapted for use in war, and any other article, material, or device, whether actual or proposed, intended for such use;

(6) "office under Government" includes any office or employment in or under any department of the Government [6]* * *;

(7) "photograph" includes an undeveloped film or plate;

(8) "prohibited place" means :

(*a*) any work of defence, arsenal, naval, military or air force establishment or station, mine, minefield, camp, ship or aircraft belonging to, or occupied by or on behalf of, Government, any military telegraph or telephone so belonging or occupied, any wireless or signal station or office so belonging or occupied and any factory, dock yard or other place so belonging or occupied and used for the purpose of building, repairing, making or storing any munitions of war, or any sketches, plans, models or documents relating thereto, or for the purpose of getting any metals, oil or minerals of use in time of war;

(*b*) any place not belonging to Government where any munitions of war or any sketches, models, plans or documents relating thereto, are being made, repaired, gotten or stored under contract with, or with any person on behalf of, Government, or otherwise on behalf of Government;

(*c*) any place belonging to or used for the purpose of Government which is for the time being declared by the Central Government, by notification in the Official Gazette, to be a prohibited place for the purposes of this Act on the ground that information with respect thereto, or damage thereto, would be useful to an enemy, and to which a copy of the notification in respect thereof has been affixed in English and in the vernacular of the locality,

(*d*) any railway, road, way or channel, or other means of communication by land or water (including any works or structures being part thereof or connected therewith) or any place used for gas, water or electricity works or other works for purposes of a public character, or any place where any munitions of war or any sketches, models, plans, or documents relating thereto, are being made, repaired, or stored otherwise than on behalf of Government, which is for the time being declared by the Central Government, by notification in the Official Gazette, to be a prohibited place for the purposes of this Act on the ground that information with respect thereto, or the destruction or obstruction thereof, or interference therewith, would be useful to an enemy, and to which a copy of the notification in respect thereof has been affixed in English and in the vernacular of the locality;

(9) "sketch" includes any photograph or other mode of representing any place or thing; and

[7]* * * * * *

[6]The words "or of the Government of the United Kingdom or of the British possession" omitted by Act 24 of 1967, s 3.

[7]Cl (9A) ins by the A.O. 1950, was rep by Act 3 of 1951, s 3.

(10) "Superintendent of Police" includes any police officer of a like or superior rank, and any person upon whom the powers of a Superintendent of Police are for the purposes of this Act conferred by the Central Government [8]* * *

Penalties for Spying

3 (1) If any person for any purpose prejudicial to the safety or interests of the State :

(*a*) approaches, inspects, passes over or is in the vicinity of, or enters, any prohibited place; or

(*b*) makes any sketch, plan, model, or note which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy; or

(*c*) obtains, collects, records or publishes or communicates to any other person any secret official code or pass word, or any sketch, plan, model, article or note or other document or information which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy[9] [or which relates to a matter the disclosure of which is likely to affect the sovereignty and integrity of India, the security of the State or friendly relations with foreign States],

he shall be punishable with imprisonment for a term which may extend, where the offence is committed in relation to any work of defence, arsenal, naval, military or air force establishment or station, mine, minefield, factory, dockyard, camp, ship or aircraft or otherwise in relation to the naval, military or air force affairs of Government or in relation to any secret official code, to fourteen years and in other cases to three years

(2) On a prosecution for an offence punishable under this section [10]* * *, it shall not be necessary to show that the accused person was guilty of any particular act tending to show a purpose prejudicial to the safety or interests of the State, and, notwithstanding that no such act is proved against him, he may be convicted if, from the circumstances of the case or his conduct or his known character as proved, it appears that his purpose was a purpose prejudicial to the safety or interests of the State, and if any sketch, plan, model, article, note, document, or information relating to or used in any prohibited place, or relating to anything in such a place, or any secret official code or pass word is made, obtained, collected, recorded, published or communicated by any person other than a person acting under lawful authority, and from the circumstances of the case or his conduct of his known character as proved it appears that his purpose was a purpose prejudicial to the safety or interests of the State, such sketch, plan, model, article, note, document, [11](information, code or pass word shall be presumed to have been made), obtained, collected, recorded, published or communicated for a purpose prejudicial to the safety or interests of the State

Communications with Foreign Agents to be Evidence of Commission of Certain Offences

4 (1) In any proceedings against a person for an offence under section 3, the fact that he has been in communication with, or attempted to communicate with, a foreign agent, whether within or without [12](India), shall be relevant for the purpose of proving that he has, for a purpose prejudicial to the safety or interests of the State, obtained or attempted to obtain information which is calculated to be or might be, or is intended to be, directly or indirectly, useful to an enemy

[8]The words "or by any L G." were rep by the A O 1937

[9]Ins by Act 24 of 1967, s 4.

[10]The words "with imprisonment for a term which may extend to fourteen years" omitted by s. 4, *ibid*

[11]Subs by s 4, *ibid*, for "or information shall be presumed to have been made".

[12]Subs by Act 3 of 1951, s 3 and Sch, for "the States"

(2) If any person for any purpose prejudicial to the safety of the State :

(*a*) retains any official document, whether or not completed or issued for use, when he has no right to retain it, or when it is contrary to his duty to retain it, or wilfully fails to comply with any directions issued by any department of the Government or any person authorised by such department with regard to the return or disposal thereof; or

(*b*) allows any other person to have possession of any official document issued for his use alone, or communicates any secret official code or pass word so issued, or, without lawful authority or excuse, has in his possession any official document or secret official code or pass word issued for the use of some person other than himself, or on obtaining possession of any official document by finding or otherwise, wilfully fails to restore it to the person or authority by whom or for whose use it was issued, or to a police-officer; or

(*c*) without lawful authority or excuse, manufactures or sells, or has in his possession for sale, any such die, seal or stamp as aforesaid:

he shall be guilty of an offence under this section.

(3) A person guilty of an offence under this section shall be punishable with imprisonment for a term which may extend to [16](three years), or with fine, or with both

(4) The provisions of sub-section (2) of section 3 shall apply for the purpose of proving a purpose prejudicial to the safety of the State, to any prosecution for an offence under this section relating to the naval, military or air force affairs of Government, or to any secret official code in like manner as they apply, for the purpose of proving a purpose prejudicial to the safety or interests of the State, to prosecutions for offences punishable under that section [17]* * *

Interfering with Officers of the Police

7 (1) No person in the vicinity of any prohibited place shall obstruct, knowingly mislead or otherwise interfere with or impede any police-officer, or any member of [18](the Armed Forces of the Union) engaged on guard, sentry, patrol, or other similar duty in relation to the prohibited place

(2) If any person acts in contravention of the provisions of this section, he shall be punishable with imprisonment which may extend to [19](three years), or with fine, or with both

Duty of Giving Information

8. (1) It shall be the duty of every person to give on demand to a Superintendent of Police, or other police-officer not below the rank of Inspector, empowered by an Inspector-General or Commissioner of Police in this behalf, or to any member of [18](the Armed Forces of the Union) engaged on guard, sentry, patrol or other similar duty, any information in his power relating to an offence or suspected offence under section 3 or under section 3 read with section 9 and, if so required, and upon tender of his reasonable expenses, to attend at such reasonable time and place as may be specified for the purpose of furnishing such information

(2) If any person fails to give any such information or to attend as aforesaid, he shall be punishable with imprisonment which may extend to [20](three years), or with fine, or with both.

[16]Subs by Act 24 of 1967, s 6, for "two years"

[17]The words "with imprisonment for a term which may extend to fourteen years" omitted by s 6, *ibid*

[18]Subs by the A O 1950 for "His Majesty's forces".

[19]Subs. by Act 24 of 1967, s 7, for "two years".

[20]Subs. by s. 8, *ibid.*, for "two years".

9 Any person who attempts to commit or abets the commission of an offence under this Act shall be punishable with the same punishment, and be liable to be proceeded against in the same manner as if he had committed such offence.

Penalty for Harbouring Spies

10. (1) If any person knowingly harbours any person whom he knows or has reasonable grounds for supposing to be a person who is about to commit or who has committed an offence under section 3 or under section 3 read with section 9 or knowingly permits to meet or assemble in any premises in his occupation or under his control any such persons, he shall be guilty of an offence under this section.

(2) It shall be the duty of every person having harboured any such person as aforesaid, or permitted to meet or assemble in any premises in his occupation or under his control any such persons as aforesaid, to give on demand to a Superintendent of Police or other police-officer nor below the rank of Inspector empowered by an Inspector-General or Commissioner of Police in this behalf, any information in his power relating to any such person or persons, and if any person fails to give any such information, he shall be guilty of an offence under section.

(3) A person guilty of an offence under this section shall be punishable with imprisonment for a term which may extent to [21](three years), or with fine, or with both.

11 (1) If a Presidency Magistrate, Magistrate of the first class or Sub-divisional Magistrate is satisfied by information on oath that there is reasonable ground for suspecting that an offence under this Act has been or is about to be committed, he may grant a search-warrant authorising any police-officer named therein, not being below the rank of an officer in charge of a police station, to enter at any time any premises or place named in the warrant, if necessary, by force, and to search the premises or place and every person found therein, and to seize any sketch, plan, model, article, note or document, or anything of a like nature, or anything which is evidence of an offence under this Act having been or being about to be committed which he may find on the premises or place or any such person, and with regard to or in connection with which he has reasonable ground for suspecting that an offence under this Act has been or is about to be committed

(2) Where it appears to a police-officer, not being below the rank of Superintendent, that the case is one of great emergency, and that in the interests of the State immediate action is necessary, he may by a written order under his hand give to any police-officer the like authority as may be given by the warrant of a Magistrate under this section

(3) Where action has been taken by a police-officer under sub-section (2) he shall, as soon as may be, report such action, in a presidency-town to the Chief Presidency Magistrate, and outside such town to the District or Sub-divisional Magistrate

[22]12. The provisions of section 337 of the Code of Criminal Procedure, 1898 shall apply in relation to an offence punishable under section 3 or under section 5 or under section 7 or under any of the said sections 3, 5 and 7 read with section 9, as they apply in relation to an offence punishable with imprisonment for a term which may extend to seven years]

13. (1) No Court (other than that of a Magistrate of the first class specially empowered in this behalf by the [23](appropriate Government) which is inferior to that of a District or Presidency Magistrate shall try any offence under this Act

(2) If any person under trial before a Magistrate for an offence under this Act at any time before a charge is framed claims to be tried by the Court of Session, the Magistrate shall, if he does not discharge the accused, commit the case for trial by that Court, notwithstanding that it is not a case exclusively triable by that Court

(3) No Court shall take cognizance of any offence under this Act unless upon complaint

[21]Subs by Act 24 of 1967, s 9, for "one year"
[22]Subs by s 10, *ibid*, for the former section.
[23]Subs by the A.O 1937 for "L.G.".

made by order of, or under authority from, the [24](appropriate Government) [25]* * * or some officer empowered by the [1](appropriate Government) in this behalf:

[26]* * * * * *

(4) For the purposes of the trial of a person for an offence under this Act, the offence may be deemed to have been committed either at the place in which the same actually was committed or at any place in [27](India) in which the offender may be found

[28][(5) In this section, the appropriate Government means :

(*a*) in relation to any offences under section 5 not connected with a prohibited place or with a foreign power, the State Government, and

(*b*) in relation to any other offence, the Central Government]

Exclusion of Public from Proceedings

14. In addition and without prejudice to any powers which Court may possess to order the exclusion of the public from any proceedings if, in the course of proceedings before a Court against any person for an offence under this Act or the proceedings on appeal, or in the course of the trial of a person under this Act, application is made by the prosecution, on the ground that the publication of any evidence to be given or of any statement to be made in the course of the proceedings would be prejudicial to the safety of the State that all or any portion of the public shall be excluded during any part of the hearing, the Court may make an order to that effect, but the passing of sentence shall in any case take place in public

Offences by Companies

[29][15 (1) If the person commiting an offence under this Act is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly :

Provided that nothing contained in this sub-section shall render any such person liable to such punishment provided in this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any negligence on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly

Explanation . For the purposes of this section .

(*a*) "company" means a body corporate and includes a firm or other association of individuals, and

(*b*) "director", in relation to a firm, means a partner in the firm)

16. (*Repeals.*) *Rep. by the Repealing Act,* 1927 (12 of 1927) *s* 2 *and Sch*



[24]Subs by the A O. 1937 for "G C in C.".
[25]The words "the L G " were omitted, *ibid.*
[26]Proviso omitted by Act 24 of 1967, s 11.
[27]Subs by Act 3 of 1951, s 3 and Sch , for "the States".
[28]Ins., by the A O 1937.
[29]Subs by Act 24 of 1967, s 12 for the former section.

Secrecy in Government
A Select Bibliography

Compiled by

Mohinder Singh and R.N. Sharma

ABEL, Albert S Administrative secrecy. *Canadian Public Administration,* 11 : 4 (Winter 1968) 440-8.

ACCESS to official papers. *Public Administration* (London), 48 (Autumn 1970) 245-6

ADAMS, Michael *Censorship the Irish experience* University (Ala.)· University of Alabama Press, 1968 265p

ADMINISTRATIVE secrecy: a comparative perspective (a symposium), ed by Francis E Rourke *Public Administration Review,* 35 1 (January/February 1975) 1-42.

AITKEN, Jonathan. *Officially secret* London· Weidenfeld & Nicholson, 1971. 236p

ALSOP, Joseph and Stewart Alsop *The reporter's trade* New York Macmillan, 1958 377p

AMERICAN Bar Foundation *Essays on executive privilege.* Chicago: American Bar Foundation, 1974. 35p.

AMERICAN Historical Association *Access to government documents papers presented to a session of the American Historical Association, December* 1972. Manhattan (Kan)· Military Affairs, 1974 11+101-107+14 leaves

ANDERSON, David A and Brandon C. Janes (eds) *Privacy and public disclosures under the Freedom of Information Act.* Austin: Tarlton Law Liberty, 1976. 178p

ANDERSON, Stanley V. Public access to government files in Sweden *American Journal of Comparative Law,* 21 . 3 (Summer 1973) 419-73

ANDREW, Christopher Whitehall's secret force *Observer,* (23 October 1977) 12

ARCHIBALD, Samuel J The Freedom of Information Act revisited *Public Administration Review,* 39 · 4 (July/August 1979) 311-18.

ARCHIBALD, Samuel J The revised F O.I. law and how to use it *Columbia Journalism Review,* (July-August 1977) 54-6

AUSTRALIA. Interdepartmental Committee on Proposed Freedom of Information Legislation *Policy proposals for freedom of information legislation.* Canberra: Government Publishing Service, 1976.

AUSTRALIA Interdepartmental Committee on Proposed Freedom of Information Legislation. *Proposed freedom of information legislation. report of Interdepartmental Committee, September* 1974. Canberra: Government Publishing Service, 1974.

BARENDT, Eric M. Official secrecy in British government: the Franks Report and the future *Round Table,* 250 (April 1973) 183-92.

BARKER, Anthony and Michael Rush *The member of parliament and his information.* London: Allen & Unwin, 1970.

BARKER, Carol M and Mathew H. Fox *Classified files, the yellowing pages: a report on scholars' access to government documents.* New York: Twentieth Century Fund, 1972 115p.

BARNDS, William J *The right to know, to withhold and to lie.* New York: Council on Religion and International Affairs, 1969 86p.

BELOFF, Michael Secrets: what now? *New Society,* (29 July 1976) 226-7.

BENTHAM, Jeremy Official secrets *New Statesman,* (15 November 1976) 707.

BERGER, Raoul *Executive privilege: a constitutional myth.* Cambridge (Mass): Harvard University Press, 1974 430p.

BISHOP, Joseph W., Jr The executive's right of privacy: an unresolved constitutional question. *Yale Law Journal,* 66(February 1957) 477-91.

BLANCHARD, Robert Okie *The Moss Committee and a federal public records law.* Doctoral dissertation, Syracuse University, 1966.

BONTECOU, F. *The federal loyalty security program* Ithaca (N.Y.): Cornell University Press, 1953. 377p.

BOSTON Public Library. *The public interest and right to know: access to government information and the role of the press. a selective bibliographic guide.* Boston: Public Library, 1971 59p.

BOYD, Francis. Cabinet secrets *Guardian,* (5 June 1962) 20.

BRECKENRIDGE, Adam Carlyle. *The executive privilege: Presidential control over information* Lincoln: University of Nebraska Press, 1974 188p

BUSHKIN Arthur A. and S.I Schaen. *The Privacy Act of* 1974: *a reference manual for compliance.* Somerville (N J)· Systems Development Corporation, 1976 183p.

CALIFORNIA. Legislature Assembly. Interim Committee on Government Organization *The right to know· the public's access to meetings and records of government agencies* Sacramento: Assembly of the State of California, 1965.

CANADA Royal Commission on Security *Report* Ottawa. Queen's Printer, 1969 159p

CANADA Royal Commission to Investigate Disclosures of Secret and Confidential Information to Unauthorised Persons. *Report* Ottawa: Queen's Printer, 1946 733p.

CANADA Secretary of State. *Legislation on public access to government documents* Ottawa: Queen's Printer, 1977

CANADA. Task Force on Government Information *To know and be known the report.* Ottawa: Queen's Printer, 1969. 2v

CANADIAN Bar Association *Freedom of Information in Canada a model bill.* Ottawa Canadian Bar Association, 1979.

CARROW, Milton R Government nondisclosure in judicial proceedings *University of Pennsylvania Law Review,* 107 (December 1958) 166-98.

CENSORSHIP· a symposium on the procedures adopted to inhibit free expression. *Seminar,* (July 1963) 10-31.

CHRISTOPH, James B. A comparative view administrative secrecy in Britain *Public Administration Review,* 35 : 1 (January/February 1975) 23-32

CLEMENT, W *The Canadian corporate elite* Toronto McClelland & Stewart, 1975

COOPER, Kent *The right to know an exposition of the evils of news suppression and propaganda* New York Farrar, Straus & Cudaby, 1956. 335p.

COX, Arthur M *The myths of national security the peril of secret government* Boston· Beacon Press, 1975

CRAWLEY, John Censorship and the media *Political Quarterly,* 47 2 (April-June 1976) 161-8

CREWDSON, Prudence How 'open' should government agencies be? *Congressional Quarterly Weekly Report,* (25 October 1975) 2265-6.

CROSS, Harold L *The People's right to know legal access to public records and proceedings.* New York· Columbia University Press, 1953. 405p

CROSSMAN, R H S The real English disease *New Statesman,* (24 September 1971) 1-2

CROSSMAN, Richard. *The diaries of a cabinet minister.* London: Hamish Hamilton, 1976-78 3v.

CURTIS, Lindsay James *Freedom of information legislation an address to the Seminar on Open Government, University of New South Wales, September* 6, 1975. Canberra· Attorney General's Department, 1975 11p

DAVIS, Vincent Secret keepers vs secret leakers *Society,* 16 . 4 (May-June 1979) 56-9

DEAKIN, James I h've got a secret· President Johnson and the press *New Republic,* (30 January 1965) 13-15

GREAT BRITAIN Lord Privy Seal. *Open government* London: HMSO, 1979. 18p Cmnd 7520.

GREAT BRITAIN. Prime Minister. *Lord Denning's report* London: HMSO, 1963. 114p. Cmnd. 2152.

GREAT BRITAIN. Prime Minister. *Report of an enquiry into an allegation of misuse of official facilities for the circulation of documents* London: HMSO, 1954. Reprint 1968. 8p. Cmnd. 583.

GREAT BRITAIN Prime Minister *Statement on the findings of the conference of privy councillors on security*. London: HMSO, 1956 5p.

GREAT BRITAIN. Privy Council *Freedom of information legislation: discussion paper*. London, 1979 53p. Memeo

GREAT BRITAIN Security Commission. *Report* London: HMSO, 1967. 8p. Cmnd 3365

GREAT BRITAIN. Security Commission. *Report*. London: HMSO, 1969. 7p Cmnd 3892

GREAT BRITAIN Tribunal Appointed to Inquire into Allegations of Improper Disclosure of Information to the Raising of Bank Rate. *Report* London: HMSO, 1958. 39p. Cmnd. 350.

GREAT BRITAIN Tribunal Appointed to Inquire into the Vassal Case and Related Matters *Report*. London HMSO, 1963 87p Cmnd. 2009

GROSS, Harold L *The people's right to know: legal access to public records and proceedings*. New York AMS Press: 1971. 405p.

GUSTAFSSON, Karl Erik and Stig Hadenius *Swedish press policy*. Stockholm: *Swedish Institute*, 1976 127p

HAHN, Walter F. *Internal motives for Soviet secrecy*. Washington (D C): International Studies Division, Institute for Defence Analyses, 1963 73p

HALPERIN, Morton H and Daniel N Hoffman. *Top secret: national security and right to know* Washington (D C). New Republic Books, 1977. 158p.

HARNON, E. Evidence excluded by state interest *Israel Law Review*, 3 (July 1968) 387-415.

HAVEMANN, Joel The legal twists and twirls of the Freedom of Information Act *National Journal*, (19 June 1978) 85-6

HAWKER, Geoffrey The administrative implications of freedom of information legislation *Australian Journal of Public Administration*. 36 : 2 (June 1977) 168-85.

HENKINGS, Thomas C. Secrecy threat to freedom. *Progressive*, 23 (April 1959) 21-4

HENNESSY, Peter. The reform of the Official Secrets Act *Times*, (25 October 1976) 12

HERLITZ, N Publicity of official documents in Sweden. *Public Law*, (Spring 1958) 50-9.

HIEBERT, Ray Eldon and Carlton E Spitzer (eds) *The voice of government* New York: John Wiley, 1968. 354p

HOLM, Eilschou The Danish system of open files in public administration *Scandinavian Studies in Law*, 19(1975) 155+

HUCKER, Charles O. *The censorial system of Ming China* Stanford (Calif): Stanford University Press, 1966. 406p

HUTTON, Clayton *Official secret the remarkable story of escape aids, their invention, production, and the sequel* New York: Crown, 1961 212p

INDIA. Laws, Statutes, etc *The Indian Official Secrets Act*, 1923

INDIA Ministry of Home Affairs *Central secretariat security instructions* New Delhi, 1976 58p

JOELSEN, Mark R The dismissal of civil servants in the interests on national security *Public Law*, (Spring 1963) 51-75

JOHNSON, Miles Beardsley. *The government secrecy controversy (a dispute involving the government and the press in the Eisenhower, Kennedy, and Johnson administrations)* New York: Vantage, 1967. 136p.

JONES, G W What is really needed in the debate on open government *Municipal Review*, 573 (September 1977) 177-8.

JONES, H M Censorship, state secrets and participatory democracy *Analysis* 33 (March 1973) 143-4

JORDAN, Grant Grey papers *Political Quarterly*, 48 1 (January-March 1977) 30-43

KAISER, Frederick M The U S intelligence community *Society*, 16 · 4 (May-June 1979) 31-9

KATZ, Alan M Government information leaks and the First Amendment *California Law Review*, 64 (January 1976) 108-45

KATZENBACH, Nicholas de B Foreign policy, public opinion and secrecy *Foreign Affairs*, 52 1 (October 1973) 1-19

KELLY, Sean *Access denied the politics of press censorship* Beverly Hills. Sage Publications, 1978 80p

KERBEE, M J (ed) *Legally available U S government information as a result of the Public Information Act* Arlington: Output System Corporation, 1970 2v

KORNS, William A. Secrecy and security *Editorial Research Reports*, (7 August 1957) 565-81.

KRISTOL, Irving Secrets of state *Wall Street Journal*, 184 (14 November 1974) 18

LAKE, Michael Our opening secrets *Guardian*, (18 February 1971) 13.

LANE, Gary. *The President versus the Congress: freedom of information* Jamaica (N.Y) : Lanco Press, 1971. 86p

LARDNER, George, Jr. Freedom of Information Act: a penchant for secrecy remains *Washington Post*, (28 July 1976)

LARDNER, George, Jr Freedom of Information Act: burdensome, costly, much used. *Washington Post*, (25 July 1976).

LARDNER, George, Jr. Information Act: years of foot-dragging not ended. *Washington Post*, (26 July 1976).

LARDNER, George, Jr. Use, abuse of Freedom of Information Act *Washington Post*, (27 July 1976)

LASHNER, Marilyn A Privacy and the public's right to know *Journalism Quarterly*, (Winter 1976) 679-88.

LAWFORD, Hugh Privacy versus freedom of information *Queen's Quarterly*, 78 (Autumn 1971) 365-71

LEWIS, Arthur W J Freedom of information *Contemporary Review*, 231 (July 1977) 1-7.

LINSTEAD, Stephen G *The law of crown privilege in Canada and elsewhere* Doctoral dissertation, Carleton University, 1968

LISTON, Robert A *The right to know: censorship in America* New York: F Watts, 1973. 150p

LLOYD, Peter *Not for publication* London Bow Publications, 1968, 80p

LOWRY, Ritchie P Toward a sociology of secrecy and security system *Social Problems*. 19 (Spring 1972) 437-50

MACCAFFERTY, Maxine (ed). *The right to know*. London: Aslib, 1976 81p

McMILLAN, John Making government accountable: a comparative analysis of freedom of information statutes *New Zealand Law Journal*, (1977) 248-56, 275-80, 286-96

MADGWICK, Donald and Tony Smythe *The invasion of privacy* London Pitman 1974 197p

MAGGS, Peter B *Nonmilitary secrecy under Soviet law*. Santa Monica Rand Corporation, 1964 95p. (p 2856)

MANKEKAR, D R Freedom of information and national sovereignty *Indian and Foreign Review*, (15 September 1979) 21-3.

MANKEKAR, D.R *The press vs the government before and during the emergency* Delhi: Clarion Books, 1978 187p

MARNELL, William H *The right to know, media and the common good* New York Seabury Press, 1973 221p

MARWICK, Christine M (ed) *Litigation under the amended Freedom of Information Act*, by Larry P Ellsworth and others 4th ed Washington (D C) Centre for National Security Studies, 1978 91+200p

MATHEWS, Anthony S *The darker reaches of government access to information about public administration in the United States, Britain, and South Africa* Berkeley University of California Press, 1978 245p

MICHAELSON, Martin Up against the stone wall *The Nation*, (21 May 1977) 614-18

MIDDLEMAS, R K Cabinet secrecy and the Crossman Diaries *Political Quarterly*, 47 1 (January-March 1976) 39-51.

MITCHELL, John J Government secrecy in theory and practice rules and regulations as an autonomous screen *Columbia Law Review*, 58 (February 1958) 199-210

MOLLENHOFF, Clark R *Washington cover-up* Garden City (N Y) Doubleday, 1962 239p

MOONMAN, Eric How secret are a government's secrets? *Times*, (19 July 1976) 12

MOSS, John E The crisis of secrecy. *Bulletin of Atomic Scientists*, 17 (January 1961) 8-11+

MOSS, John E Is there a paper curtain in Washington *Congressional Record*, 101 (1 August 1955) 13246-8

MUKHARJI, G *Access to official records and information* New Delhi Indian Institute of Public Administration, 1967 70p Mimeo

MURRAY, Vernon G *Government lawlessness in America* New York· Oxford University Press, 1971

NADEL, Mark V. Corporate secrecy and political accountability *Public Administration Review*, 35 . 1 (January/February 1975) 14-23

NAYAR, Kuldip Freedom of information *Indian Express*, (11 March 1977) 4

NEWTON, V M , Jr *Crusade for democracy* Ames Iowa State University Press 1961. 316p

NIMMER, Melville B National security measures v free speech the issue left undecided in the Ellsberg case *Stanford Law Review*, (26 January 1974) 311-33.

NOORANI, A G Amending Official Secrets Act *Indian Express*, (15 January 1979) 6

NOORANI, A G. Censorship in British raj *Indian Express*, (13 March 1977) 8

NOORANI, A G (ed) *Freedom of the press in India proceedings of a seminar held in Srinagar, May* 1970 Bombay. Nachiketa, 1971 143p.

NORWAY. Laws, Statutes, etc *The Public Access Act*, 1970

O'BRIEN, David M Freedom of information, privacy, and information control: a contemporary administrative dilemma *Public Administration Review*, 39 : 4 (July-August 1979) 323-8.

OJO, J.D Freedom of the press in Nigeria since 1960: a comparative analysis *Journal of the Indian Law Institute*, 18 · 4 (October-December 1976) 529-50

O'REILLY, James T *Federal information disclosure: procedure, forms, and the law*. Colorado Springs· Shepard's Inc of Colorado Springs, 1977—Loose leaf binder.

PAI PANANDIKAR, D R Secrecy in budget-making *Hindustan Times*, (8 August 1978) 9

PARASHURAM, T V U S secret papers *Indian Express*, (14 August 1975) 4; (15 August 1975) 6.

PARRY, Clive. Legislatures and secrecy *Harvard Law Review*, 67 : 5 (March 1954) 737-85

PATCH, B W Access to official papers and information *Editorial Research Reports*, (24 June 1953) 417-33.

PATCH, B W. Protection of official secrets *Editorial Research Reports*, (25 February 1948) 125-40

PLAYFAIR, Giles The right to know. *Spectator*, (23 July 1965) 102.

PORTER, John A *The vertical mosaic an analysis of social class and power in Canada* Toronto: University of Toronto Press, 1965. 626p

POTTER, David C Political change and confidential government files in India· 1937, 1941, 1967 *Journal of Commonwealth Political Studies*, 8 : 2 (July 1970) 134-46.

PUBLIC Affairs Committee *Loyalty and security in a democracy*. New York· Public Affairs Committee, 1957 28p

RALPH, C H The state and official secrets *New Statesman*, (16 March 1962) 362

RANKIN, T. Murray *Freedom of information in Canada will the doors stay shut?* Ottawa· Canadian Bar Association, 1977 155p

RANSOM, Harry Howe The uses (and abuses) of secret power toward reshaping the intelligence community *Worldview*, 18 (May 1975) 11-15.

RAYMOND, Allen The news the people can't get *Reporter*, (2 October 1951) 26-30

RAYMOND, Allen *The people's right to know a report on government news suppression* New York· American Civil Liberties Union, 1955. 48p.

RAYMOND, Jack Problems of secrecy. *Challenge*, 7 (July 1959) 31-4.

RELYEA, Harold C Faithful execution of the FOI Act. a legislative branch perspective. *Public Administration Review*, 39 . 4 (July/August 1979) 328-32

RELYEA, Harold C The Freedom of Information Act a decade later. *Public Administration Review*, 39 : 4 (July/August 1979) 310-11.

RELYEA, Harold C. Opening government to public scrutiny. a decade of federal reports *Public Administration Review*, 35 : 1 (January/February 1975) 3-10.

RIGNEY, Daniel Secrecy and social cohesion. *Society*, 16 : 4 (May-June 1979) 52-5

ROBERTS, Russell M. Faithful execution of the FOI Act: one executive branch experience *Public Administration Review*, 39 : 4 (July/August 1979) 318-23.

ROBINSON, Jack A *The British Official Secrets Act: an examination.* Arlington (Va) : Centre for Naval Analysis, 1972. 25p

RODGERS, Harell R., Jr Prelude to conflict: the evolution of censorship campaigns *Pacific Sociological Review*, 18 : 2 (April 1975) 194-205.

ROPER, Michael Public records and the policy process in the twentieth century *Public Administration* (London), 55 (Autumn 1977) 253-68.

ROTHCHILD, John Finding the facts bureaucrats hide *Washington Monthly*, 3 (January 1972) 15-27.

ROURKE, Francis E. Administrative secrecy: a comparative perspective-introduction *Public Administration Review*, 35 : 1 (January/February 1975) 1-2.

ROURKE, Francis E Administrative secrecy: a congressional dilemma. *American Political Science Review*, 54 (September 1960) 684-94

ROURKE, Francis E *Bureaucracy, politics, and public policy*. Boston: Little Brown, 1969 173p.

ROURKE, Francis E. *Secrecy and publicity: dilemmas of democracy* Baltimore John Hopkins Press, 1961 236p

ROURKE, Francis E Secrecy in American bureaucracy. *Political Science Review*, 72 (December 1957) 540-64.

ROWAT, Donald C *Administrative secrecy in developing countries* London Macmillan, 1979. 364p.

ROWAT, Donald C How much administrative secrecy? *Canadian Journal of Economics and Political Science*, 31 4 (November 1965) 479-98, Comments by K W. Knight *Canadian Journal of Economics and Politics and Political Science*, 32 : 1 (February 1966) 77-84, Author's reply *Canadian Journal of Economics and Political Science*, 32 . 1 (February 1966) 84-7.

ROWAT, Donald C The problem of administrative secrecy. *International Review of Administrative Sciences*, 32 . 2 (1966) 99-106.

SAHAY, S. Access to information. *Statesman*, (26 April 1979) 6.

SAHAY, S. Freedom of information. *Statesman*, (3 August 1978) 6.

SALOCHIN, Robert L. The Freedom of Information Act: a government perspective *Public Administration Review*, 35 : 1 (January/February 1975) 10-14.

SAMUEL, Peter. Government secrecy. *Australian Quarterly*, 44 : 2 (June 1972) 5-8.

SEARCY, Seth S. Privacy and public records: the emerging conflict in values *Public Affairs Comment*, 24 : 1 (November 1977) entire issue.

SELDES, George. *You can't print that. the truth behind the news*. New York: Payson & Clarke, 1929. 465p.

SHACKFORD, R.H. Reports and comment: Washington: use of secret information by government for self serving purposes. *Atlantic*, (September 1971) 18-20+

SHACKLETON, Doris Cavell Martin French. *Power town: democracy discarded*. London: McClelland & Stewart, 1977. 221p.

SHAPIRO, M.M. (ed.). *The Pentagon papers and the courts*. San Francisco: Chandler, 1972 131p.

SHAW, Gaylord. *How to get your share of government treasure*. Washington (D.C.): U.S. News & World Report, 1975. 256p.

SHERBANIUK, D J. Budget secrecy. *Canadian Tax Journal*, 24 (May-June 1976) 223-30.

SHERICK, L.G. *How to use the Freedom of Information Act*. (*FOIA*), New York: Arco, 1978. 138p.

SHILS, Edward E. *The torment of secrecy*. London: William Heinemann, 1956, 238p.

SIEGAL Leon V. Official secrecy and informal communication in congressional-bureaucratic relations *Political Science Quarterly*, 90 : 1 (Spring 1975) 71-92.

SILKIN, Arthur. Green papers and changing methods of consultation in British government. *Public Administration* (London), 51 (Winter 1973) 427-88.

SMILEY, D.V. *The freedom of information issue: a political analysis*. Toronto· Ontario Commission on Freedom of Information and Individual Privacy, 1978.

SMITH, Gaddis. *Democracy, secrecy, and national security: are they in conflict*. Washington (D.C). Center for Information on America, 1972. 4p.

SNYDER, Gerald S. *The right to be informed: censorship in the United States*. New York: Messner, 1976. 191p.

SORABJEE, Soli J. *Law of press censorship in India*. Bombay: N.M. Tripathi, 1976 272p.

SPIGELMAN, Jim J. *Secrecy: political censorship in Australia*. Sydney: Angus and Robertson, 1972 194p.

STALLINGS, C. Wayne. Local information policy: confidentiality and public access. *Public Administration Review,* 34 : 3 (May/June 1974) 197-204.

STAVELEY, Ronald and Marry Piggott (eds) *Government information and the research worker,* 2nd ed London: Library Association, 1965. 267p.

STONE, William T. Secrecy in government. *Editorial Research Reports,* (21 December 1955) 895-912.

STREET, Harry. Secrecy in the town halls. *New Society,* (15 December 1977) 567-8.

STREET, Harry. State secrets: a comparative study. *Modern Law Review,* 14 (April 1951) 121-35.

SUMMERS, Robert Edward (ed). *Federal information controls in peace time.* New York: H.W. Wilson, 1940, 301p.

TAYLOR, A.J.P. Keeping it dark: half-century secrets. *Encounter,* 13 (August 1959) 40-5.

TAYLOR, Rufus L. Secrecy in government. *United States Naval Institute Proceedings,* 99 (March 1973) 72-7.

TEFFT, Stanton K. The politics of secrecy. *Society,* 16 : 4 (May-June 1979) 60-7.

THOMAS, Hugh. Too many secrets *Times,* (17 February 1968) 17.

THOMAS, Paul G. Secrecy and publicity in Canadian government. *Canadian Public Administration,* 19 : 1 (Spring 1976) 158-64.

THOMPSON, Donald. The Committee of 100 and the Official Secrets Act, 1911. *Public Law,* (Summer 1963) 201-26.

THURMAN, S. David. *The right to access to information from the government.* New York: Oceana, 1973. 113p.

TULLOCK, Gordon. A note on censorship. *American Political Science Review,* 33 : 4 (December 1968) 1265-7.

UNITED STATES. Commission on Government Security *Report* Washington (D.C) Government Printing Office, 1957.

UNITED STATES. Congress House of Representatives Committee on Government Operations. *Availability of information from Federal departments and agencies, scientific information and national defense twenty third report* Washington D C : Government Printing Office, 1958. 94p (85th Congress, 2nd Session)

UNITED STATES Congress House of Representatives Committee on Government Operations *U.S. government information policies and practices: administration and operation of the Freedom of Information Act.* Washington (D C.): Government Printing Office, 1972. (92nd Congress, 2nd Session)

UNITED STATES. Congress. Senate. Committee on Government Operations Foreign Operations and Government Information Subcommittee. *Administration of the Freedom of Information Act. an evaluation of government information under the Act,* 1967-72. New York: Praeger, 1973. 177p.

UNITED STATES Congress. Senate. Committee on Government Operations. Sub-committee on Intergovernmental Relations. *Legislation on government secrecy.* Washington (D.C.) Superintendent of Documents, 1974. 265p (93rd Congress, 2nd Session).

UNITED STATES. Congress Senate Committee on the Judiciary. *Freedom of Information Act source book: legislative materials, cases, articles.* Washington (D.C) : Government Printing Office, 1974 432p (93rd Congress, 2nd Session).

UNITED STATES. Congress Senate Committee on the Judiciary. Sub-Committee on Constitutional Rights. *Withholding of information from the Congress: a survey.* Washington: (D.C.): Government Printing Office, 1961, 99p.

UNITED STATES Congress. Senate. Committee on the Judiciary. Sub-Committee on Separation of Powers *Refusals by the executive branch to provide information to the Congress,* 1964-1973: *a survey of instances in which executive agencies of the government have withheld information from members and Committees of the Congress and from the Comptroller General of the United States.* Washington (D.C): Government Printing Office, 1974. 571p. (93rd Congress, 2nd Session).

UNITED STATES Department of Justice. *Is a congressional committee entitled to demand and receive information and papers from the President and the heads of departments which they deem confidential, in the public interest?* (Washington 1953) 102p.

UNITED STATES Department of Justice. *The power of the President to withhold information from the Congress · memorandums of the Attorney General* Compiled by the Sub-committee on Constitutional Rights of the Committee on the Judiciary, United States Senate Washington (D C) : Government Printing Office, 1958-59. 2 v.

UNITED STATES Department of Justice *Regulations relating to defense information under Executive Order No.* 10501. (Atlanta, 1954). 29p.

UNITED STATES Department of Justice. *Regulations relating to security information (originating in or coming under the jurisdiction or control of the) Department of Justice* (Atlanta, 1952) 21p.

UNITED STATES General Accounting Office *Refusals to the General Accounting Office of Access to records of the executive departments and agencies: report prepared by the Comptroller General of the United States at the request of the Committee on Government Operations, U S Senate* Washington (D C) Government Printing Office, 1960. (86th Congress, 2nd Session) 13p.

UNITED STATES. Interagency Classification Review Committee. *Implementation of Executive order* 11652 *on classification and declassification of national security information and material· progress report* Washington (D.C)· Government Printing Office, 1975. 80p.

UNITED STATES Library of Congress Foreign Affairs Division *Security classification as a problem in the Congressional role in foreign policy prepared for the use of the Committee on Foreign Relations, United States, Senate* Washington (D.C) Government Printing Office, 1971. 41p

UNITED STATES Navy Department. *Security manual for classified information OPNAV instruction* 5510. 1*B* Washington (D C) Navy Department, Chief of Naval Operations, Office of Naval Intelligence, 1958.

UNITED STATES President (Richard Nixon). Classification and declassification of national security information and material· statement by the President upon establishing a new classification system and directing the acceleration of publication of the "Foreign Relations" series (Executive Order 1652, March 8, 1972) *Weekly Compilation of Presidential Documents*, (13 March 1972) 542-50.

UNITED STATES Privacy Protection Study Commission. *Personal privacy in an information society*. Washington (D C). Government Printing Office, 1977

VINSON, Tony and Arthur Robinson Censorship and the Australian public *Australian Journal of Social Issues*, 3 : 3 (April 1968) 63-74

WALL, D.F The provision of government information, printed as an appendix to the *Minutes of Proceedings and Evidence of the Standing Joint Committee on Regulations and other Statutory Instruments, Government of Canada*, 25 *June* 1975, p 30-71

WARREN Earl. Government secrecy: corruption's ally *American Bar Association Journal*, 60 (May 1974) 550-2.

WATKINS, Alan. Official secrets. *New Statesman*, (5 February 1971) 170-2

WATT, D C. Security procedures in the British foreign service In his *Personalities and policies studies in the formulation of British foreign policy in the twentieth century;* London: Longmans, 1965, p. 199-207

WENNERGEN, B Civic information· administrative publicity *International Review of Administrative Sciences*, 36 : 3 (1970) 243-50.

WESTIN, Alan *Privacy and freedom*. London· Bodley Head, 1970 487p

WICKER, T. Perils of government secrecy *Current*, 174 (July 1975) 15-17

WIGGINS, James R *Freedom or secrecy*. New York: Oxford University Press, 1956. 242p.

WILLIAMS, DAVID. *Not in the public interest: the problem of security in democracy* London. Hutchinson, 1965. 224p

WISE, David and Thomas B Ross *The invisible government* London: Jonathan Cape, 1964. 375p.

WISE, David *The politics of lying: government deception, secrecy and power* New York: Random House, 1973. 415p

WORSNOP, Richard L. Secrecy in government *Editorial Research Reports*, (18 August 1971) 629-50.

WRAITH, Ronald E. *Open government: the British interpretation*. London: Royal Institute of Public Administration, 1977. 74p.

YATES, Ian. Secrets: publish and be prosecuted. *Observer*, (7 February 1971) 8.

YOUNG, David M. Security and the right to know. *Military Review*, 44 (August 1964) 46-53.

ZAGEL, James. The state secrets privilege. *Minnesota Law Review*, 50 (April 1966) 875-910



INTERNATIONAL REVIEW OF ADMINISTRATIVE SCIENCES

Contents of Vol. XLV (1979) : No. 3

*Article written in French or in Spanish, with an extensive summary in English.

Schools and Institute of Public Administration. Bibliography: A Selection. Article, Technical Co-operation, News in Brief. Chronicle of the Institute.

Annual Subscription: U.S. $50. Single Copy: US $13.50

INTERNATIONAL INSTITUTE OF ADMINISTRATIVE SCIENCES
25, rue de la Charite; B-1040 Brussels
(Belgium)

	Rs.
Special Issues of IJPA	
Administrative Reforms Since Independence Supplement to Vol. IX, No. 3, 1963)	7.50
The Collector in the Nineteen Sixties (Vol. XI, No. 3, 1965)	10.00
Tasks and Priorities in Administrative Reforms (Vol. XII, No. 3, 1966)	10.00
Science and Government (Vol. XV, No. 3, 1969)	15.00
Recent Trends and Developments in Public Administration in India (Vol. XVII, No. 3, 1971)	10.00
Multilevel Planning (Vol. XIX, No. 3, 1973)	7.00
State Administration in India (Vol. XXII, No. 3 1976)	15.00
Development of Backward Areas (Vol. XXIII, No. 3, 1977)	15.00
Police Administration (Vol. XXIV, No. 1, 1978)	20.00
Decentralisation in Administration (Vol. XXIV, No. 3, 1978)	20.00
Other Publications	
Social Responsibilities of Public Administrators *by* Swami Ranganathananda	1.50
District Planning in India *by* Sudipto Mundle	30.00
Planning Process in a District *by* Kamal Nayan Kabra	30.00
Family Planning in India (A Descriptive Analysis) *by* Shanta Kohli	15.00
Population Control in India (Policy-Administration-Spread) *by* A P. Barnabas	30.00
Integrated Delivery System for Social Services *by* V. Jagannadham and Mohit Bhattacharya	30.00
Cumulative Index to Indian Journal of Public Administration (Vol. I to XX)	50.00
Jawaharlal Nehru and Public Administration	15.00
Social Welfare Organisation *by* V. Jagannadham	5.50
Social Change in a North Indian Village *by* A.P. Barnabas	10.00
Voluntary Action in a Developing Society *by* V.M. Kulkarni	5.00
Citizen's Grievances and Administration *by* A.P. Barnabas	10 00
Administering Agricultural Development *by* A.P. Barnabas and Donald C. Pelz	10.00
Panchayati Raj Administration—Old Controls and New Challenges *by* Iqbal Narain, Sushil Kumar, P.C. Mathur and Associates	25.00
The Reorganised Planning Commission *by* H.K. Paranjape	5 00
Deputy Commissioner in Punjab *by* Sudesh Kumar Sharma	30.00
Government Through Consultation *by* S.R. Maheshwari	25.00
Administration of Government Industries *by* R.S Arora	18 00
Training and Development in Government *by* A.P. Saxena	12.00
Framing of India's Constitution (5 Vols.):	
For Libraries & Institutions } (Sold at IIPA)	150.00
For Individuals } (Sold at IIPA)	100.00